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TRANSCRIPT OF RECORD

(IN TWO VOLUMES)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 75

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

vs.

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

VOLUME 2

PETITION FOR CERTIORARI FILED MAY 11, 1940
CERTIORARI GRANTED JUNE 3, 1940

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

vs.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS GESELLSCHAFT, m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of Hermann Sielcken, Deceased,
Intervenor in Proceeding to Vacate, Appellant, and Respondent on Cross-Appeal.

THE ATTORNEY-GENERAL OF THE UNITED STATES, on behalf of the United States and as successor to the Alien Property Custodian,
Respondent and Cross-Appellant.

THE UNITED STATES OF AMERICA,
Respondent.

JOHN S. SORENSON,
Defendant-Respondent.

RECORD ON APPEAL AND CROSS-APPEAL.

1864 **Answering Affidavit of John F. McIlwain.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
1865 HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

State of New York,
County of New York, ss:

1866 John F. McIlwain, being duly sworn, deposes and says:

That he resides at 18 South Road, Harrison, New York.

That he has been connected with the Trust Department of the Irving Trust Company since 1926, which at the time bore the name of American Exchange-Irving Trust Company and which is the same corporation which was formerly named Columbia Trust Company and was appointed executor herein of Hermann Sielcken, deceased, in January 1918.

That up to May 1933 deponent had no special connection whatever with the estate of Hermann Sielcken, deceased, but when Mr. Orrin R. Judd retired from the Trust Company about May 1933 deponent was put in immediate charge of the affairs of administration of the

estate of Hermann Sielcken. Mr. Paul E. Mead, who is now absent from the State, came in, in 1935, and since that time he has had general supervision of the affairs of that estate, he being the head of the Trust Department.

At the time when deponent took hold of the affairs of the estate, there was a large amount of litigation going on concerning it, in which the Trust Company was represented by Mr. Leonard B. Smith and Mr. Selden Bacon, and deponent as far as possible familiarized himself with the general condition of all that litigation. 1868

The collection of the judgment entered in this cause in December, 1929, had occurred about three years before deponent became connected with the matters of the estate, and deponent never attempted to familiarize himself with the details of the earlier proceedings in this Court or before the Mixed Claims Commission which led up to the settlement made in 1930, except to keep track of actual payments received and made by the executor.

The account herein, filed in December 1937 in the Surrogate's Court for the County of New York was prepared by Mr. Bacon with deponent's assistance, and 1869 deponent's knowledge of the receipts in 1930 and thereafter and the disposition made thereof was confined to the entries made on the executor's books in the department and to deponent's actual knowledge of the receipts and disbursements made after May 1933.

From the time in May 1933 when deponent became connected with the affairs of the estate until late 1937, the executor was engaged in heavy litigation against Mrs. Sielcken Schwarz, which was being conducted by a number of attorneys on her part, including Mr. Brainard Avery, Mr. George W. Alger and others, consisting chiefly in a suit instituted by her in Ohio and a proceeding instituted by her in the Surrogate's Court for New York County to vacate the decrees of the Surrogate's Court entered respectively in 1921, 1922 and 1925,

settling and approving the accounts of this executor for this estate.

In view of the fact that Mr. Avery and Mr. Alger and Mr. Avery's partners were acting as attorneys against the executor, it was obviously inadvisable for deponent to attempt to get from them a history of the transactions leading up to the entry of the decree of December 30, 1929 in this Court and the award of the Mixed Claims Commission on the Wille Memorial made in 1930, and deponent never learned until August 1938 of the details
1871 of the proceedings and steps leading up to the settlement of 1930; deponent first learning of those steps from the affidavit of Brainard Avery, verified herein August 11, 1938.

The proceedings in the Surrogate's Court to vacate the said former decrees were terminated only on or about the 30th day of September, 1937, and the Ohio suit some time early in 1938.

Since Mr. Judd left the Irving Trust Company in 1933 there has been no one connected with the Trust Company who had personal knowledge of the details of the history of the administration of the estate. Deponent's principal study of them since that time has been car-
1872 ried out through a study by Mr. Bacon of the records of the Trust Company and in the Courts and in the correspondence of Messrs. Leonard B. Smith, Smith & Agate, Davies, Auerbach & Cornell and others of those prior transactions.

Deponent further says that in preparing the pending account herein in the Surrogate's Court, of which a copy is annexed to the affidavit of Selden Bacon, verified herein, on the 12th day of August, 1938, deponent did not attempt to give any explanation of the settlement that was made in 1930, merely detailing the actual receipts and payments in accordance with the settlement agreement that deponent found among the files of the Irving Trust Company. Deponent at that time had no means of ascertaining how that settlement had been reached or

just how it was reached. There was no one concerned in the account as far as the executor knew who was in any way affected as far as the account was concerned by the method in which that settlement had been reached, the Attorney General having applied to be made a party to that accounting only in January 1938 after the account had been verified and filed. The statements in that account, as to the receipt and disbursement of the sums received by the executor under the decree herein and under the award of the Mixed Claims Commission against Germany impleaded with Theodor Wille were, therefore, intended merely as a statement of actual receipts and disbursements by the executor.

Aside from what is above stated, deponent has never had any detailed knowledge or information concerning the way that settlement of 1930 was brought about and accomplished.

JOHN F. McILWAIN

Subscribed and sworn to before me this
12th day of August, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co.

N. Y. No. 1870.
Certificate filed in N .Y. Co. No. 180.
N. Y. County Register's No. 0-O-105.
My commission expires March 30, 1940.
(Seal)

1876 **Answering Affidavit of Orrin R. Judd.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDINGS TO VACATE DECREE.]

State of New York,
County of New York, ss:

Orrin R. Judd, being duly sworn, deposes and says:

1877 That from 1925 to the spring of 1935, deponent was a Vice President of the Irving Trust Company, but since 1935 deponent has not been connected therewith.

That during the period from May 1925, when Mr. George E. Warren, a Vice President of the Company, left the Trust Company, deponent was, until he left the Company in 1935, in primary charge for the Irving Trust Company of all matters affecting the administration of the estate of Hermann Sielcken, deceased, and of the Trust Company's administration of the affairs of the former firm of Crossman & Sielcken, and deponent gave constant attention thereto.

1878 That at no time during that period was any claim ever made to this executor or to any one connected with it so far as deponent ever heard, either by the firm of Theodor Wille of Hamburg or by the firm of Theodor Wille of Santos, South America, or any one in their behalf, that either of those firms had any interest whatever in any sum that might be recovered on behalf of the said firm of Crossman & Sielcken from any purchasers of what are known as the "seized cargoes" as to which the above-entitled suit was brought in this Court.

No explanation was ever made to us or reported to me or to the Trust Company of the basis on which the firm of Theodor Wille made a demand in 1930, on the Zentral Einkaufsgesellschaft and the German Agent before the Mixed Claims Commission, for payment of $100,000 as a

condition to its signing various papers required for the settlement of the two claims before the Mixed Claims Commission, and the claim of the Zentral Einkaufsgesellschaft for indemnity, and the payment of the judgment recovered in this suit.

The first I ever heard of that demand was at a time considerably after the entry of the decree herein and, as I recall it, some time in March 1930. At that time I had been informed by Mr. Avery that the negotiations with Dr. von Lewinski, the German Agent, had reached a conclusion that was satisfactory, both to the Zentral 1880
Einkaufsgesellschaft and to Mrs. Sielcken Schwarz but that after such agreement had been reached in theory, which included also the settlement of the claim made by the Memorial filed against Wille, Dr. von Lewinski had stated that he was having difficulty about obtaining the required releases from Theodor Wille.

After some negotiations, as I was informed by Mr. Avery, the German Agent had advised Mr. Avery that Theodor Wille would sign the releases if they got $100,000, and that the Zentral Einkaufsgesellschaft would contribute one half of that amount if the claimants would contribute the other half.

It was pointed out to me that what that amounted 1881
to, as far as we were concerned, was simply a deduction from the amount that we would get under the agreed award against Wille; that he, Avery, and his associates and Mrs. Sielcken Schwarz all regarded the general settlement as so advantageous that they were willing to consent to that payment to Wille rather than have the settlement fail; that the sum coming to us, even after that deduction, would be considerably more than the $1,000,000 Mrs. Sielcken Schwarz had given her attorneys authority to settle for.

The compromise by which about $360,000 was paid to the Zentral Einkaufsgesellschaft was merely a compromise of the claim advanced to us by Zentral Einkaufsgesellschaft that they held an indemnity agreement, executed

by the German Executors of the late Hermann Sielcken, to the effect that in case the firm of Crossman & Sielcken recovered anything from the Zentral Einkaufsgesellschaft on account of the cargoes involved in this suit, the German Executors would reimburse the Zentral Einkaufsgesellschaft any amount so recovered and indemnify them against any consequent loss. We had a copy of that agreement, and the sole defense to it that we were advised of was the claim we had already advanced before the Mixed Claims Commission, that that agreement was invalid by reason of the double position held in the matter by the German Executors who had signed that indemnity agreement, in consequence of which their own personal interests were involved in that agreement in opposition to the interests of the estate.

The individual estate of Hermann Sielcken in Germany had been valued by the United States Government, in connection with the Estate Tax on said Sielcken's American estate, at $1,171,771.74, of which nearly a half consisted of real estate in Baden, Germany; and as Mrs. Sielcken Schwarz was the residuary legatee of the entire estate of Hermann Sielcken (both that in the United States and that in Germany), it was not of moment to her whether any payment under that indemnity agreement was paid out of the assets of Sielcken's estate in Germany or out of the assets belonging to his estate in this country.

In the judgment of all of us, the compromise of that claim for indemnity at fifty per cent was a distinctly advantageous one to the estate, as we very much dreaded the attitude the German Courts might take with regard to that indemnity agreement, although it seemed to our counsel that under our own law the agreement would be held invalid, and the expense of litigation there would be great.

It was pointed out to me at the time that any claim under that indemnity agreement would naturally be prosecuted in the Courts of Germany where all the par-

ties to that indemnity agreement resided. We had and had filed with the Mixed Claims Commission an opinion of an eminent German lawyer, Dr. Neumann, that the indemnity contract was void under German law. But unquestionably the point was one of extreme difficulty and both sides so regarded it. We feared the outcome of such a case in the German Courts. Under those circumstances, the compromise at fifty per cent seemed to us reasonable and desirable, as the terms of the compromise, including the payment of the $50,000 for Wille, were approved by Mrs. Sielcken Schwarz before the 1886
compromise was finally agreed to by us.

The payment made to Zentral Einkaufsgesellschaft was not a division of the recovery from the United States under the decree in this suit under any claim by it to be entitled to any part of that recovery, but a payment in compromise of that counterclaim for indemnity.

The payments for purposes of immediate closing were made out of those particular funds, which were immediately available instead of awaiting the receipt of other funds by the estate, which came in in adequate amount only a few weeks later.

ORRIN R. JUDD. 1887

Subscribed and sworn to before me this.
30th day of July, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co.
N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal)

1888

Answering Affidavit of Selden Bacon.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE IN PROCEEDINGS TO VACATE DECREE.]

State of New York,
County of New York, ss:

1889

Selden Bacon, being duly sworn, deposes and says:

I was retained as special counsel in connection with matters affecting the Sielcken estate by the Irving Trust Company as Executor of Hermann Sielcken, deceased, about the 1st of November, 1931, at first in connection with a suit that had been instituted by the Chase National Bank as executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Clara Sielcken Schwarz and the Irving Trust Company as executor of Hermann Sielcken, deceased, and other nominal defendants who had never been served, and also in connection with a proposed suit, later instituted by Mrs. Clara Sielcken Schwarz in the Court of Common Pleas for Lucas County, Ohio,

1890

against the Woolson Spice Company and a number of other individual defendants and the Irving Trust Company as such executor, seeking to vacate a sale of shares of the Woolson Spice Company stock that had been made by the Irving Trust Company as such executor in 1918.

From time to time afterwards deponent was engaged (as such special counsel in each case) jointly with Mr. Leonard B. Smith (who had been the regular counsel for the executor many years previous) to attend to other litigation, and particularly to the proceedings brought in the Surrogate's Court by Mrs. Sielcken Schwarz in 1932 to vacate three decrees of the Surrogate's Court approving accounts of the Irving Trust Company as executor, which decrees had been entered respectively in 1921, 1922 and 1925; also in connection with various tax

proceedings and other suits; and later in preparing and submitting the pending accounting of the Executor in the said Surrogate's Court, of which account a true and correct copy is hereto annexed, marked Exhibit A, and hereby made a part of this affidavit.

Deponent further says that in all such preceding litigation, and during the preparation of the said account, deponent had never had occasion to examine minutely into the proceedings conducted in 1927 to 1930 before the Mixed Claims Commission and in the above entitled suit in this Court, although deponent had been familiar 1892
with the Memorials and answers before the Mixed Claims Commission and the pleadings and decree in the above entitled suit, so far as germane to said proceedings in which deponent was retained; and in preparing such account deponent gave the financial figures of the actual disposition and distribution made of the sums recovered under the decree in this suit and under the award of the Mixed Claims Commission under the so-called Wille Memorial (of which copy is hereto annexed, marked Exhibit B, and hereby made a part of this affidavit), but without examining into the origin and nature of the facts occasioning the particular distribution made, all of which had occurred more than a year prior to deponent's 1893
first connection with the estate.

Deponent further says that he annexes hereto also a copy of the answer to the 1927 Wille Memorial that was filed by Germany (without the exhibits thereto), marked Exhibit C, and hereby made a part of this affidavit.

Until the present motion was noticed deponent never had occasion to inquire into the exact nature and details of the compromise agreement under which such payments were made.

From May 1933 on, there has been no one connected with the Trust Company who had had any detailed knowledge of that settlement, and from 1932 on deponent had been opposed to Mrs. Clara Sielcken Schwarz and the various attorneys whom she had employed in

connection with the presentation and settlement of the said claims and this suit, both in the said Toledo suit and in the said proceedings to vacate the said decrees, both of which were very complicated and prolonged and stoutly litigated, and which were finally disposed of, one in late 1937 and the other in 1938. During all that period deponent naturally was unable to consult with the attorneys who had been employed by and represented Mrs. Sielcken and represented nominally the executor and the surviving partners in the two
1895 Memorials, and the plaintiffs in this suit, concerning any details which could in any way affect the other very complicated litigation in which deponent was directly opposed to them; and it is only since the present motion was first noticed by the United States that deponent has been able to inquire of them into the very complicated details of the prosecution and settlement of those Memorials and of this suit. Under those conditions, in preparing the said pending account in late 1937, deponent made no attempt to state the details of any of those proceedings beyond the mere financial set-up, showing the executor's receipts and disbursements, beyond which no statement was necessary in the accounting proceeding as
1896 to any of the parties originally cited thereto.

Neither the Attorney General nor the Alien Property Custodian nor the Treasurer of the United States nor the United States were any of them cited to attend that accounting or believed to have any interest therein.

In January, 1938, however, the Attorney General of the United States as successor to the Alien Property Custodian applied to intervene as a party to that accounting, claiming that he had, in January, 1938 vacated the 1921 release of the share of Mrs. Sielcken Schwarz as residuary legatee of Hermann Sielcken, deceased, under said Sielcken's will and that he was in consequence entitled to receive her share, a matter as yet undisposed of beyond the admission of the Attorney General as a party to that accounting proceeding.

Since the Irving Trust Company was allowed to intervene in this present proceeding, deponent has very carefully familiarized himself with all the proceedings had and has talked at length with Mr. Brainard Avery, Mr. Richard S. Doyle, and less at length with Hon. Charles D. Hamel, who, except for Mr. Barnes, who is dead, and Mr. George W. Alger who is abroad, were the principal attorneys for the plaintiffs in this cause as well as for the claimants in the said Wille and Zentral Einkaufsgesellschaft Memorials of 1927.

Owing to Mr. Alger's unexpected departure for Europe, deponent has not discussed the matter with him personally, though deponent is informed by Mr. Avery that Mr. Avery had, at deponent's suggestion, discussed the matter at considerable length with Mr. Alger, whose recollection conformed to that of Mr. Avery.

Deponent was informed by Mr. Avery during July that Mr. Alger was ready to make an affidavit; but Mr. Alger departed suddenly from the country on July 30th, 1938, without prior notice to deponent that he was going and will not return to the country until about the first day of September. Deponent, on behalf of the Irving Trust Company (for whom he is acting as solicitor and counsel) will desire to submit an affidavit by Mr. Alger which will be, as deponent is informed and believes, substantially along the lines of the affidavits of Mr. Brainard Avery and Mr. Richard S. Doyle in so far as Mr. Alger was connected with the matter, and deponent asks leave to submit such an affidavit promptly after Mr. Alger's return to the country.

Deponent further says that he annexes hereto a copy of the award made by the Mixed Claims Commission under the Wille Memorial of 1927, marked Exhibit D hereof, and made a part hereof; that the amount actually awarded as stated by the United States Treasurer to the Irving Trust Company, was principal $558,827.85 and interest to January 1st, 1928, $272,524.27, making a total of $831,352.12, as of January 1st, 1928.

1900 *Answering Affidavit of Selden Bacon*

Deponent further, on behalf of the Irving Trust Company, presents for hearing on this motion the files in this cause including the pleadings, the decree, the stenographer's minutes of the trial of this case before this Court, the two opinions of the Court therein, and the order to show cause why the Irving Trust Company should not be permitted to intervene on this motion, and the affidavits and sworn petition on which that order was granted, copies of which were served on the Attorney for the United States herein on the 16th day of June, 1938, and also the affidavits of Messrs. George E. Warren, Brainard Avery, Orrin R. Judd, Richard S. Doyle, Frederick Wirth, Jr., William Abramson, George O. Castell, Leonard B. Smith, John F. McIlwain and Charles D. Hamel as explaining the situation which the moving affidavits have so misrepresented to the Court, although apparently without reference to the nature of the motion made, which is simply on the ground that this Court was without jurisdiction to enter the decree herein of December 30, 1929, without specifying in any way in what respect it is claimed such lack of jurisdiction existed.

1901

Deponent further says that he has talked with Mr. John S. Sorenson, the surviving plaintiff in this cause, Mr. Nielsen having died nearly eight years ago without deponent's ever having seen him. Mr. Sorenson has refused to make any affidavit beyond that already filed by him in this cause in his own behalf; but prior to such refusal said Sorenson had informed deponent that both he and Nielsen, at the time of bringing this suit, believed that all claim of Theodor Wille to any interest in any recovery that might be had herein had been settled and abandoned by Wille prior to 1924, and believed that said firm of Theodor Wille at the time this suit was brought and of filing the Memorial against Z.E.G. in 1927 had no interest whatever in any recovery therein or thereunder; and that both he and said Nielsen were advised and believed that they were the proper parties plaintiff in this suit to assert a claim of the former part-

1902

nership of Crossman & Sielcken, of which they were in 1927 the sole surviving members, and deponent believes these statements made to him by Mr. Sorenson to be true.

Deponent further says that the fact that any and all such claim of Theodor Wille had been wiped out prior to 1924 by a settlement made with that firm by Mrs. Clara Sielcken Schwarz, the residuary legatee, is confirmed by the entry on the books of the firm of Crossman & Sielcken which are in deponent's actual possession and with which deponent is familiar, charging off the balance of the claim against Theodor Wille which in 1917 had been supposed to exist against Wille by reason of the loss of said cargoes, to Profit and Loss in February 1924; as well as by a letter in deponent's possession written at that time by Mr. Sorenson to Mr. Leonard B. Smith (deponent's associate solicitor herein), in March 1924, advising that such charge to Profit and Loss had been made on the books of the firm. 1904

Deponent further says that he is informed by documents now in the possession of deponent that Mr. Thomas E. Rhodes, the Assistant Attorney General who appeared for the United States Treasurer and the Alien Property Custodian as counsel at the trial of this suit, made in March 1930 a report to the Solicitor General of the United States concerning possible appeal from the decree of December 30th, 1929, herein, advising that no appeal be taken, and that that report was approved by the Solicitor General. 1905

That during July, 1938, deponent had several conferences, either personally or by telephone, with Mr. McNamara, an Assistant Attorney General of the United States, who has appeared on this motion, with regard to the production of papers herein for inspection. Deponent told Mr. McNamara that the Trust Company had nothing to conceal in this matter, and that deponent would advise it to allow the Attorney General or his representatives to see any relevant papers in the Trust Company's possession relating to the questions involved in the present

motion, but that before deciding to do so deponent desired to consult his client, which deponent did, and then advised Mr. McNamara that the Irving Trust Company thought there should be some reciprocity in the matter of examining papers before allowing a general inspection, and Mr. McNamara then advised deponent that he would not make any promises or accede to any conditions of his examining papers in the matter in deponent's custody, but suggested that deponent write him for such papers as the Trust Company desired to see, and stated
1907 expressly that he would decline to make production of such papers by the Attorney General's office a condition for obtaining inspection of papers in the possession of the Trust Company.

The only specific papers Mr. McNamara stated he wished to see were papers to copies of which he already had access, as deponent pointed out to him.

In response to Mr. McNamara's suggestion, on the 21st of July, 1938, deponent sent a letter to the Attorney General of the United States, marked for attention of Mr. McNamara, of which a copy is hereto annexed and marked Exhibit E. In reply, on or about the 24th of July, 1938, deponent received a letter from the Depart-
1908 ment of Justice, of which a copy is hereto annexed, marked Exhibit F.

Deponent has had no further word from the Department of Justice on the subject of being afforded copies of these papers, which are, directly material to the issues attempted to be raised by the moving papers herein.

Deponent further says that the whole matter of the Memorials before the Mixed Claims Commission and the recovery of the decree herein and payment thereof, and the compromise arrangement of the matter were all concluded more than a year before deponent was in any way connected with the affairs of this estate, but that deponent has carefully examined the documents in the case in possession of the executor and a large part of the files of the Mixed Claims Commission, and from-

those files and documents and deponent's careful questioning of Messrs. Brainard Avery, Doyle and Hamel, and such other information as deponent has been able to secure, deponent believes the account given by Mr. Avery in his affidavit herein, verified August 11, 1938, of the situation in regard to that compromise to be correct.

SELDEN BACON.

Subscribed and sworn to before
me this 12th day of August, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 480.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.

(Seal)

1912 **Exhibit A Annexed to Answering Affidavit of Selden Bacon.**

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER of The Judicial Settlement of the Account of Proceedings of IRVING TRUST COMPANY as Executor of HERMANN SIELCKEN, Deceased.	INTERMEDIATE ACCOUNT OF PROCEEDINGS OF EXECUTOR. FILE NO. No.

1913

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK:

The undersigned IRVING TRUST COMPANY doth render the following intermediate account of its proceedings as Executor of Hermann Sielcken, deceased, from the 18th day of March, 1927, to the 1st day of December, 1937.

Deceased died a resident of Baden-Baden, in Baden, Germany, on the 8th day of October, 1917.

1914 On the 26th day of January, 1918, Letters Testamentary under his will were issued to the Irving Trust Company (under its former name, Columbia Trust Company).

On the 24th day of June, 1919, the Executor filed in the Surrogate's Court of the County of New York, an account extending from the date of its appointment to the 28th day of February, 1919. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 7th, 1921, and filed in the office of the Clerk of said Court on the 8th day of July, 1921.

On the 28th day of March, 1922, the Executor filed in said Surrogate's Court a second account extending from the 28th day of February, 1919, the date of its previous accounting, to and including the 31st day of December, 1921. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 11th, 1922, and filed in the office of the Clerk of said Court on the 13th day of July, 1922.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

On the 30th day of January, 1925, the Executor filed in said Surrogate's Court a third account extending from the 31st day of December, 1921, the date of its last previous accounting, to and including the 14th day of January, 1925. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated and filed in the office of the Clerk of said Court on February 9th, 1925.

As of the 18th day of March, 1927, the Executor rendered a voluntary extra judicial account to the residuary legatee, then the sole person interested in the estate, of which a copy is hereto annexed as Exhibit 1 of Schedule K of this account. Said voluntary account was thereafter approved by the Supreme Court for the State of New York by judgment entered in the office of the clerk of the County of New York on the 8th day of November, 1937, in an action in which an account of the partnership of Crossman & Sielcken was ordered by decree of that court of November 11, 1933, in which said voluntary account was set forth in full as part of that accounting. Such accounting was rendered in an action entitled Chase National Bank of the City of New York as ancillary executor of Thorleif S. B. Nielsen against John S. Sorenson, Clara Sielcken Schwarz and this executor and others, defendants.

The New York transfer tax on this estate was fixed by orders of this Court dated respectively the 21st day of November, 1919 and the 27th day of November 1923, and was fully paid prior to 1924, as shown in the prior accountings of this executor.

SCHEDULE A, hereto annexed, contains an itemized statement of all moneys and other property (including any item reported in Schedule B-1 as uncollectible) belonging to the estate or fund, which have come into its hands or which have been received by any person for it or on its behalf as such Executor from its last accounting as of the 18th day of March, 1927, (including balance then on hand) to and including the 1st day of December, 1937.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

SCHEDULE A-1, hereto annexed, contains a full and complete statement of all increment to the capital of the estate whether derived from increases due to sale, liquidation, distribution of capital dividends, distribution to legatees or distributees at values in excess of values stated in Schedule A or in any other manner since the last accounting as of March 18th, 1927. In each instance the date of realization of the increment and the amount thereof is given and the property from which the increment was derived is identified as far as may be with the property listed in Schedule A.

SCHEDULE A-2, hereto annexed, contains a full and complete statement of all income received during this accounting period of the administration, (March 18th, 1927 to December 1st, 1937), together with a statement of the source, the date and the amount of each receipt.

SCHEDULE A-3, hereto annexed, contains a statement of Refunding bonds now held by the Executor executed by the Residuary Legatee and of the security given by her therefor.

SCHEDULE B, hereto annexed, contains a full and complete statement of all decreases in the quantity or the value of the assets of the estate together with a statement of the cause of such decrease or loss of assets or of value and whether the decrease or loss has been actually realized and, if so, the date of realization and whether it arose by reason of a sale, liquidation, physical loss, physical damage or any other reason since the last accounting as of March 18th, 1927.

SCHEDULE B-1, hereto annexed, contains a full and complete statement of all debts due to deceased and of all rights of property enuring to the benefit of deceased which are listed in Schedules A, A-1 and A-3 and which have not been collected and are not collectible by it together with a statement of the reason for such non-collection.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

SCHEDULE C, hereto annexed, contains an itemized statement of all moneys paid by it for administration, funeral and other necessary expenses for said estate, together with the reason and object of each such expenditure and the date of each such payment, since its last accounting as of March 18th, 1927.

SCHEDULE C-1, hereto annexed, contains an itemized statement of all unpaid undisputed claims for administration, funeral and other necessary expenses for said estate, together with a statement of the nature of each such claim.

SCHEDULE D, hereto annexed, contains an itemized statement of all claims of creditors presented to this executor or which have come to its knowledge, together with a statement whether any right of preference exists in respect of such claims and the claimed basis to such right, if any.

SCHEDULE D-1, hereto annexed, contains a statement of claims upon which judgment or decree has been rendered against your accountant since the date of its last accounting, March 18th, 1927, together with the names of the claimants, the general nature of the claim sued upon, the amount of the judgment rendered, the name of the court in which it was rendered, and the date of the entry of the judgment.

SCHEDULE D-2, hereto annexed, contains an itemized statement of the personal claims, if any, of the accounting party payable only after proof to and allowance by the Surrogate pursuant to Section 212 of the Surrogate's Court Act, paid since the last accounting, as of March 18th, 1927. Any payment made without prior allowance by the Surrogate is separately listed and the reason for such unauthorized payment stated.

1924 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE D-3, hereto annexed, contains a statement of claims which have been presented during the administration of the estate since March 18th, 1927 and which have been disputed or rejected by this executor together with the reason for such rejection.

SCHEDULE E, hereto annexed, contains a full and complete statement of all claims of creditors presented to, allowed and paid by the executor, since its last accounting as of March 18th, 1927, together with the names
1925 of the claimants, the general nature of the claim, the date of payment, the amount actually paid to the creditor and whether any right of preference exists or is asserted.

SCHEDULE F, hereto annexed, contains an itemized statement of all moneys paid and of property delivered to the legatees, trustees, surviving spouse or distributees of the deceased since its last accounting, as of March 18th, 1927, and the date of payment or delivery thereof and the name of the person to whom payment or delivery was actually made.

1926

SCHEDULE G, hereto annexed, contains an itemized statement showing all property remaining in the hands of your accountant, including a statement of all uncollected debts, credits, receivables and property rights due either to deceased or to the estate as of the 1st day of December, 1937, the last day of the account as set forth above.

SCHEDULE H, hereto annexed, contains the names of all persons entitled as legatee, trustee, surviving spouse, devisee, distributee or otherwise to a share of the estate or fund, with their post office addresses and the degree of relationship of each to the deceased; a statement showing the nature of and the value or approximate value of the interest of each such person; a statement listing separately each person so interested in the estate who

1927

is an infant or an incompetent and, in the case of each infant, listing the name of his father, mother, guardian or the person with whom he resides and, in the case of each incompetent, listing the name of his committee and the post office address of the committee so far as known; a statement that the records of this court have been searched for powers of attorney and assignments and encumbrances made and executed by any of the persons interested in or entitled to a share of the estate and a list detailing each power of attorney, assignment and encumbrance disclosed by such search with the date of its record and the name and address of each attorney in fact and of each assignee and of each person beneficially interested under the encumbrance referred to in the respective instruments, and also whether the accounting party has any knowledge of the execution of any such power of attorney or assignment Not so filed and recorded.

1928

SCHEDULE I, hereto annexed, contains a statement showing all estate taxes assessed and paid by it upon or in respect of any property required to be included in the gross estate of the decedent under the provisions of the Tax Law or under the provisions of any United States Revenue Act, since March 18th, 1927, the date of this executor's last accounting.

1929

This schedule also contains a computation setting forth the proposed allocation of taxes paid and to be paid and the amounts due the estate from each person in whose behalf a tax payment has been made and also the proportionate amount of the tax paid by each of the named persons interested in this estate or charged against their respective interests, as provided in Section 124 of the Decedent Estate Law.

SCHEDULE J, hereto annexed, contains a computation of the amount of commissions due upon this accounting. This schedule conforms to the directions contained in the Rules of the Surrogate's Court, New York County.

1930 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE K, hereto annexed, contains a statement of all other facts affecting the administration of said estate or fund and the rights of those interested therein.

This schedule contains the information required by Rule X, subdivision 7, Rules of the Surrogate's Court, New York County.

This schedule also contains a statement of any real property left by the decedent which it is not necessary
1931 to include as estate assets to be accounted for, a brief description thereof, the gross value, the amount of mortgages or liens thereon at the date of death of deceased, so far as known to this executor.

1932

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1933

THE FOLLOWING IS A SUMMARY STATEMENT OF THIS EXECUTOR'S ACCOUNT:

CHARGES:

Amount shown by Schedule "A" (Original capital of estate as shown by prior account as of March 18th, 1927)	$1,976.87		
and reimbursements	58,770.65	$ 60,747.52	1934
Amount shown by Schedule "A-1" (increment to capital since March 18th, 1927)		1,321,885.58	
Amount shown by Schedule "A-2" (Income during accounting period)		22,056.66	
Total Charges			$1,404,689.76

CREDITS:

Amount shown by Schedule "B" (Realized decreases and losses of capital asset values since March 18th, 1927)		$ 0	1935
Amount shown by Schedule "B-1" (Uncollectible property)		$ 392,382.43	
Amount shown by Schedule "C" (Funeral and administration expenses actually paid)		$ 229,867.35	
Amount shown by Schedule "E" (Debts actually paid)		$ 0	
Amount shown by Schedule "F" (Legacies or distributive shares actually paid)		$ 782,004.39	
Total Credits			$1,404,254.17
Balance on hand shown by Schedule "G"			$435.59

1936 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The foregoing balance aggregating $435.59 consists of $435.59 in cash remaining on hand as of the 1st day of December, 1937. It is subject to deduction of estimated commissions amounting to $19,026.92, shown in Schedule J and of the expenses of this accounting and of the unpaid liabilities of the estate and of the executor chargeable to the estate shown in Schedules C-1, D and D-3.

In addition to the assets above mentioned, this Executor holds the refunding bonds of Mrs. Clara Sielcken-Schwarz
1937 shown in Schedule A-3, and the unpaid and at present uncollectible balance of the award of the mixed Claims Commission—United States and Germany, shown in Schedule B-1.

The attached schedules, which are severally signed by this Executor are part of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann
Sielcken, Deceased,
1938 By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Schedule A.

ITEMIZED STATEMENT OF ALL MONEYS AND OTHER PROPERTY BELONGING TO THE ESTATE OF HERMANN SIELCKEN, DECEASED, WHICH HAVE COME INTO THE HANDS OF THE EXECUTOR, OR WHICH HAVE BEEN RECEIVED BY ANY PERSON FOR IT OR ON ITS BEHALF AS SUCH EXECUTOR SINCE THE OPENING OF BUSINESS ON MARCH 18TH, 1927, INCLUDING PROPERTY THEN ON HAND.

1927		
Mar. 18	Cash balance on hand, as shown by voluntary accounting as of March 18th, 1927 ..... (This voluntary accounting was confirmed and approved by final judgment of the Supreme Court for the County of New York rendered in an action in that Court entitled The Chase National Bank of the City of New York as Ancillary Executor of the last will and testament of Thorleif S. B. Nielsen, deceased, Plaintiff, against John S. Sorenson, Irving Trust Company as Executor of the last will and testament of Hermann Sielcken, deceased, Clara Sielcken Schwarz, and others, defendants, entered in the office of the Clerk of the County of New York on the 8th day of November, 1937.)	$ 1,976.87
Aug. 30	Refund from deposit with Clerk of United States Supreme Court	32.80
1931		
Apr. 28	Refund from Clara Sielcken Schwarz out of deposit with Chase National Bank	39,999.20
1933		
Dec. 6	Refund from deposit with Clerk of United States District Court, Southern District of New York in Stewart suit	8.00
1934		
Apr. 23	Subpoena fee in Matter of Sielcken	1.00
1935		
Apr. 23	Subpoena fee in Matter of Sielcken	2.00

1942 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

May 17 1936	Subpoena fee in Toledo action		1.00
Jan. 22 1937	Subpoena fee in Matter of Sielcken		.50
Mar. 29	Voluntary Return by Executor of part of award of Executor's Commissions by decree of February 9, 1925, inadvertently in excess of correct computation thereof		759.15
Oct. 26	Refund from deposit with Chase National Bank pursuant to decree of Surrogate of October 23rd, 1937		17,967.00
			$60,747.52

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Schedule A-1.

1944

STATEMENT OF ALL INCREMENT TO THE CAPITAL OF THE ESTATE.

The Executor charges itself with:

Receipts from Partnership Claims of Firm of Crossman & Sielcken, first discovered after March 18th, 1927.

Receipts from Zentral Einkaufs-Gesellschaft claim:		
Cash	$ 83,240.70*	
United States Treasury Notes 3½% ($130,000 of these notes were redeemed in Cash; and the other $100,000 were distributed to the residuary legatee, as shown in Schedule F.)	230,000.00*	
		313,240.70

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1945

Receipts from Mixed Claims Commission Award on Wille claim:

1930			
June 2	Cash from United States Treasury	$466,369.69*	
Nov. 12	Cash from United States Treasury	43,299.08*	
1931			1946
Apr. 28	Cash from United States Treasury	28,577.39*	
1932			
Jan. 8	Cash from United States Treasury	78,016.29*	
	Total		$ 616,262.45
	Unpaid balance of such Award now uncollected and at present uncollectible (See Schedule G) consisting of		1947
	Balance Principal of Award	$211,922.88*	
	Interest accrued on Award to October 9th, 1931, as reported by United States Treasury	122,367.39*	
			334,360.27*
	Subsequent interest computed to March 31, 1937, as reported by Treasury Department		58,022.16
	Total		$1,321,885.58

NOTE:—The history of the above items will be found in Schedules I and K.

1948 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

All starred items shown in this Schedule were also included in the partnership accounting in the Supreme Court and were settled and approved by the judgment in that case of November 8th, 1937. They are starred here for reference made thereto in Schedule K of this account.

December 1, 1937.

1949 IRVING TRUST COMPANY,
as Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Schedule A-2.

STATEMENT OF INCOME RECEIVED SINCE MARCH 18TH, 1927.

1930			
May	28	Bank interest November 29 to May 21, 1930 (Three Name Account)	$ 109.73*
1950 Sept.	15	Coupons $230,000 United States Treasury Notes (Three Name Account)	4,025.00*
Nov.	15	Bank interest May 21 to November 14, 1930 (Three Name Account)	3,527.10*
Nov.	28	Bank interest November 12 to November 21, 1930 (Three Name Account)	33.22*
Nov.	28	Bank interest to November 21, 1930	110.36
1931			
Jan.	15	Bank interest November 22 to January 1, 1931 (Three Name Account)	128.12*
Jan.	15	Bank interest to January 14, 1931	887.34
Mar.	16	Coupons on $130,000 U. S. Treasury 3½% Notes	2,275.00
May	28	Bank interest to May 21, 1931	1,043.52
Nov.	25	Bank interest to November 21, 1931	1,521.04
Nov.	27	Bank interest to November 21, 1931 (Three Name Account)	1,070.36*

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1932			
May 24	Bank interest to May 21, 1932	1,292.71	
May 25	Bank interest to May 21, 1932 (Three Name Account	1,060.55*	
Nov. 28	Bank interest to November 22, 1932	960.77	
Nov. 29	Bank interest to November 22, 1932 (Three Name Account)	1,203.00*	
1933			
Sept. 13	Bank interest to June 15, 1933 (Three Name Account)	1,363.59*	
Nov. 14	Bank interest to June 15, 1933	906.61	
1934			
May 19	Bank interest to May 19, 1934, on $10,000 deposit, in Rosenblum case	458.37	
1935			
Dec. 7	Bank interest to November 21, 1935	35.85	
1936			
Dec. 5	Bank interest to November 21, 1936	33.22	
1937			
Oct. 5	Bank interest to November 30, 1937	11.20	
		$22,056.66	

(Certain portions of the payments received set forth in Schedule A-1 included some interest in the gross amounts awarded by the United States District Court decree and by the Mixed Claims Commission Award. But, as both principal and income go into a common fund, and there is no separate beneficiary of income, we have not attempted the complicated separation of these items into their component parts, but have included the entire items so received as principal in Schedule A-1 of this Account.)

Starred receipts in this Schedule were re-received into the Three Name Account, were

1954 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

included in the Partnership Accounting in the Supreme Court and settled and approved by its judgment of November 8, 1937, and are referred to in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

1955

1956

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1957

Schedule A-3.

REFUNDING BONDS.

In addition to these funds belonging to the Estate the Executor, on the occasions of different distributions to the residuary legatee, Clara Sielcken Schwarz, received from her refunding bonds of the following dates and in the following amounts:

Bond of April 6th, 1921 in the penal sum of 1958
$3,000,000 securing return of $1,500,000, or such part thereof as shall appear to be necessary for the payment of legacies, debts or liabilities.

Bond of February 9th, 1925 in the penal sum of $559,836.88 to secure repayment of $279,918.44 or such part thereof as shall appear to be necessary for the payment of legacies, debts or liabilities.

Bond of date February 24th, 1931 in the penal sum of $600,000 of which copy is hereto annexed, marked Exhibit A and hereby made a part of this Schedule.

Bond of date February 24th, 1931 in the penal sum of $79,998.40 of which copy is hereto annexed marked Exhibit B and hereby made a part of this Schedule. 1959

In connection with the last two bonds, said Clara Sielcken Schwarz made a deposit with The Chase National Bank of the City of New York as security for the said bonds of various securities. Also annexed hereto is a copy of the agreement under which the said securities were deposited with the said Chase National Bank which is marked Exhibit C. Said exhibits A, B and C are hereby made parts of this account.

The two payments of $39,999.20 of April 28, 1931 and of $17,967 of October 26, 1937, shown in Schedule A were refunds to the executor out of such deposit.

As this executor is informed and believes, the securities and cash now held by the said Chase National Bank

1960 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

as such depositary as security for the said last two-mentioned refunding bonds consist of the following items:

Cash Balance	$55,961.61
$5,000 Baltimore & Ohio R. R. Co. F RF & GN 5%, due March 1996.	
$10,000 Bush Term Bldg. Co. 1st Mg. 5%, due April 1960.	
$5,000 Canadian National Railways 5%, due July, 1969.	
1961 $5,000 City Wat Co. Chatta B 1st Mg. 5%, due December, 1954.	
$15,000 Interstate Public Service Co Dist & Rf 5%, due December 1956.	
$20,000 Interstate Pr Co Del 1st Mg. 5%, due January, 1957.	
$20,000 Joplin Water Works Co. A 1st Mg. 5%, due March, 1957.	
$25,000 Louisiana Pr. & Lt. Co. 1st Mg. 5%, due December, 1957.	
$25,000 Mississippi Pr. & Lt. Co. 1st Mg. 5%, due December, 1957.	
$15,000 Nevada California El. Corp. 1st Mg.	
1962 5%, April, 1956.	
$15,000 New Orleans Public Service B 1st & Rf. 5%, due June, 1955.	
$30,000 New York Dock Co. 1st Mg. 4%, due August, 1951.	
$25,000 Penn Central Lt. & Pr. Co. 1st Mg. 4½%, due November, 1977.	
$20,000 St. Louis Iron Mt. So. Ry. 1st Mg. 4%, due May, 1933.	
$20,000 Cd. St. Louis San Fran A PRILN 4%, due July, 1950.	
$10,000 South Pitts. Water Co. A 1st & Rf, 5%, due January, 1960.	
$19,000 Southern Pacific Co. 4½%, due May, 1969.	
$20,000 Wabash R. R. Co. 2d Mg. 5%, due February, 1939.	
$5,000 Wichita Water Co. Ser. B 1st Mg. 5%,	

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1963

Since the deposit of said amounts, the said Clara Sielcken Schwarz has made, as the executor is informed and believes, assignments of interest in any balance of said deposit not needed to meet the obligations to the estate, to various persons as security as follows:

To the New York Trust Company as Trustee, subsequently transferred to Emilie Bender and Brainard Avery as substituted Trustees, to secure various sums now aggregating approximately $20,000 1964

To Brainard Avery	New York City
To Howard Hasbrouck	New York City
To George W. Alger	New York City
To I. Gainsburg	New York City
To Isaac H. Levy	New York City
To Newton D. Baker	Cleveland, Ohio
To Raymond T. Jackson	Cleveland, Ohio
To Harold Fraser	Toledo, Ohio
To Charles H. Kelby	Borough of Manhattan, N. Y.
To John G. Saxe	Borough of Manhattan, N. Y.
To Joseph M. Proskauer	Borough of Manhattan, N. Y. 1965
To Leonard P. Moore	Borough of Manhattan, N. Y.
To James D. Miller	Borough of Manhattan, N. Y.
To William Martin	Borough of Manhattan, N. Y.
To Charles D. Hamel	Washington, D. C.

to secure the sum of $200,000 for their services to her.

The interest of said Martin under such assignment was thereafter by him assigned to the Bank of Valley Stream which has been taken over by the Banking Superintendent of the State of New York.

Certain other assignments of her interest in such fund had also as this executor is informed and believes, been made by said Clara Sielcken Schwarz to various per-

1966 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

sons as security, subject to the rights of this executor but such other assignments, as this executor is informed and believes, have all been satisfied and released, and the above-named persons are the only claimants besides this executor and said Clara Sielcken Schwarz of interests in the said fund, save only that The Chase National Bank of the City of New York, as your petitioner is informed and believes, also makes a claim thereon for commissions for acting as depositary of said fund.

1967

Exhibit A.

KNOW ALL MEN BY THESE PRESENTS, That I, CLARA SIELCKEN SCHWARZ, am held and firmly bound unto IRVING TRUST COMPANY, a corporation organized under the laws of the State of New York, as Executor of the Will of Hermann Sielcken, deceased, in the sum of Six Hundred Thousand Dollars ($600,000.00), good and lawful money of the United States, to be paid to the said Executor as aforesaid, its successors or assigns, for which
1968 payment well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents.

Sealed with my seal.

Dated this 24th day of February, 1931.

WHEREAS, the said Hermann Sielcken, husband of the said Clara Sielcken Schwarz, by his last will bearing date the 23rd day of March, 1914, gave and bequeathed to the said Clara Sielcken Schwarz his entire residuary estate; and

WHEREAS, the said executor has this day paid to the said Clara Sielcken Schwarz on account of the said legacy the sum of Three Hundred Thousand Dollars ($300,000), receipt whereof is hereby acknowledged by said Clara Sielcken Schwarz;

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1969

Now the condition of this obligation is such that if the money so paid as aforesaid to the said Clara Sielcken Schwarz on account of her said legacy, shall at any time be necessary to discharge any debt, liability or legacy which the said Executor shall not have other assets to pay, then and in such case, or in any of such cases, if the said Clara Sielcken Schwarz, her heirs, executors or administrators shall return the said payment of Three Hundred Thousand Dollars ($300,000), and also any payments which may be hereafter made by the said Executor to said Clara Sielcken Schwarz on account of her said 1970
legacy, or such part thereof as shall appear to be necessary for the payment of such debts, liabilities or legacies, and the costs and charges, if there be any, incurred by reason of the payment of said Clara Sielcken Schwarz; or if the probate of the will of the said deceased be revoked or the will declared void, wholly or as to such legacy, then and in such case if the said Clara Sielcken Schwarz shall return the whole of the said payment of Three Hundred Thousand Dollars ($300,000) with interest, to the said Irving Trust Company as such Executor, its successors or assigns, then this obligation is to be void; otherwise to remain in full force and virtue. 1971

CLARA SIELCKEN SCHWARZ (Seal)

In the presence of:
ELIZABETH BAY

Consulate of the U. S. A.
Republic of France
Department of the Maritime—Alps ss:
City of Nice

I, Geo. P. Wilson, Vice Consul of the United States of America, at Nice, France, duly commissioned and qualified, do certify that on this 24th day of February, 1931, before me personally appeared CLARA SIELCKEN SCHWARZ, to me known and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument and being by me in-

1972 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

formed of the contents of said instrument, she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year above written.

GEO. P. WILSON, Vice Consul,
Vice Consul of the United States of America, Nice, France.

1973 American Consulate
Nice, France
$2.00 Fee Stamp
Cancelled Feb. 24, 1936

Service No. 00604
Fee 51.20

Exhibit, B.

KNOW ALL MEN BY THESE PRESENTS, That I, CLARA SIELCKEN SCHWARZ, am held and firmly bound unto IRVING TRUST COMPANY, a corporation organized under the
1974 laws of the State of New York, as Executor of the Will of Hermann Sielcken, deceased, in the sum of Seventy-nine thousand nine hundred and ninety-eight and 40/100 Dollars ($79,998.40), good and lawful money of the United States, to be paid to the said Executor as aforesaid, its successors or assigns, for which payment well and truly to be made, I do bind myself, my heirs, executors and administrators firmly by these presents.

Sealed with my seal.

Dated, this 24th day of February, 1931.

WHEREAS, the said Hermann Sielcken, husband of the said Clara Sielcken Schwarz, by his last will bearing date the 23rd day of March, 1914, gave and bequeathed to the said Clara Sielcken Schwarz his entire residuary estate; and

WHEREAS, the said executor has this day paid to the said Clara Sielcken Schwarz on account of the said legacy

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1975

the sum of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20), receipt whereof is hereby acknowledged by said Clara Sielcken Schwarz;

Now the condition of this obligation is such that if the money so paid as aforesaid to the said Clara Sielcken Schwarz on account of her said legacy, shall at any time be necessary to discharge any debt, liability or legacy which the said Executor shall not have other assets to pay, then and in such case, or in any of such cases, if 1976
the said Clara Sielcken Schwarz, her heirs, executors or administrators shall return the said payment of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20), and also any payments which may be hereafter made by the said Executor to said Clara Sielcken Schwarz on account of her said legacy, or such part thereof as shall appear to be necessary for the payment of such debts, liabilities or legacies, and the costs and charges, if there be any, incurred by reason of the payment of said Clara Sielcken Schwarz; or if the probate of the will of the said deceased be revoked, or the will declared void, wholly or as to such legacy, then and 1977
in such case if the said Clara Sielcken Schwarz shall return the whole of the said payment of Thirty-nine thousand nine hundred and ninety-nine and 20/100 dollars ($39,999.20) with interest, to the said Irving Trust Company as such Executor, its successors or assigns, then this obligation is to be void; otherwise to remain in full force and virtue.

CLARA SIELCKEN SCHWARZ (Seal)

In the Presence of:
ELIZABETH BAY

Consulate of the U. S. A.
Republic of France
Department of the Maritime—Alps ss.:
City of Nice

I, Geo. P. Wilson, Vice Consul of the United States of America, at Nice, France, duly commissioned and quali-

1978 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

fied, do certify that on this 24th day of February, 1931, before me personally appeared CLARA SIELCKEN SCHWARZ, to me known and known to me to be the individual described in, whose name is subscribed to, and who executed the foregoing instrument and being by me informed of the contents of said instrument, she duly acknowledged to me that she executed the same freely and voluntarily for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand
1979 and official seal the day and year above written.

GEO. P. WILSON, Vice Consul
Vice Consul of the United States of America, Nice, France.

AMERICAN CONSULATE,
NICE, FRANCE
$2.00 Fee Stamp
Cancelled Feb. 24, 1931

Service No. 00603
Fee 51.20

1980 *Exhibit C.*

IRVING TRUST COMPANY

AMERICAN EXCHANGE OFFICE

Sixty Broadway

New York

ORRIN R. JUDD
Vice President

February 3rd, 1931.

Chase National Bank of the City of New York,
20 Pine Street,
New York City:

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1981

Gentlemen:

This Company is Executor of the Will of Hermann Sielcken, deceased, and as such Executor we hold certain funds against which a number of claims have been asserted by various persons and are now in course of litigation. Mrs. Clara Sielcken Schwarz, the residuary legatee under the said Will, has requested us to make her payments aggregating the sum of $339,999.20 without waiting for the outcome of the pending litigation, and is proposing to give her refunding bonds in the usual form 1982
binding her to return the said payments, or such part thereof as shall appear to be necessary, in case the Executor shall at any time be called upon to discharge any debt, liability or legacy which it shall not have other assets to pay, or in case the probate of the Will of said decedent shall be revoked or the Will declared void, wholly or as to such residuary legacy. She has also offered to us that she will authorize you to set aside securities belonging to her and now in your custody as her agent, of the aggregate market value of $400,000, to hold as a special deposit as collateral security for the said proposed refunding bonds, to indemnify us against any loss, liability or damage that we may incur by having 1983
made the said proposed payments to Mrs. Sielcken-Schwarz.

We hereby hand you checks to your order aggregating the sum of $339,999.20 upon the condition that you are either to furnish to us, before April 1, 1931, receipts for said sum and refunding bonds in the form herewith handed you duly executed by Mrs. Sielcken Schwarz, and are also to give us within that time a letter signed by yourselves and stating that by authority of Mrs. Sielcken Schwarz you hold as a special deposit as collateral security as aforesaid, securities belonging to Mrs. Schwarz aggregating in market value the sum of $400,000; or else, in the event of your failure to deliver to us the said refunding bonds and the said letter of deposit before April 1, 1931, you are to return to us the said payment of $339,999.20 herewith made to you, with banking interest.

1984 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The conditions of the said proposed special deposit are to be as follows. The securities making up said deposit are to be selected to our satisfaction from the securities belonging to Mrs. Sielcken Schwarz in your possession, and we are to have the right at any time during the term of the deposit to require changes or substitutions in the said securities, provided only that all new securities thus required by us shall be first-class negotiable securities legal for trust funds. Until service upon
1985 you by us of written notice that we claim the right to immediate reimbursement out of said deposit, you shall be at liberty to pay the income from the securities as it accrues to Mrs. Sielcken Schwarz. The said deposit shall be held by you until receipt of a written release from us, and such release shall not be demanded of us until the termination of all litigation affecting the funds now in our hands as aforesaid.

Kindly sign the acceptance at the foot of this letter as evidence of your agreement to the terms of the payment herewith made to you.

Very truly yours,

1986 IRVING TRUST COMPANY,
as Executor of the Will of Hermann Sielcken, deceased.

By O. R. JUDD,
Vice-President

Accepted:
CHASE NATIONAL BANK OF THE CITY OF NEW YORK
By G. E. Warren,
Vice-President.
December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,

By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 1987

B.

DECREASES IN ESTATE SINCE MARCH 18TH, 1927.

(NONE.)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken,
Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary. 1988

Schedule B-1.

UNCOLLECTED DEBTS DUE DECEDENT ENURING TO BENEFIT OF ESTATE.

I.

1989

1931

Oct. 9 Uncollected balance of Award of Mixed Claims Commission—United States and Germany.

Balance as of this date, as shown by United States Treasury report of that date.

Principal (*so-called*) made up of *principal* at date of April 1, 1918 (including interest to that date from decedent's death on October 8th, 1917) $558,827.85

Exhibit A Annexed to Answering Affidavit of Selden Bacon

and interest at 5 per cent from April 1st, 1918 to April 21st, 1930 (date of award)	$272,524.27	
Total Principal Award		$831,352.12
Against which payments have been made by United States Treasury aggregating, as shown in Schedule A-1		$619,359.24
(From each of the above payments there was deducted by the United States Treasury before payment ½ of 1 per cent of each payment pursuant to the United States Statute so that the amount actually received by the Estate from the Treasury was only, as shown in Schedule A-1 $616,262.45)		
Balance due of such principal		$211,992.88
Unpaid Interest accruing on the balance of such "principal" subsequent to date of the Award to October 9th, 1931		$122,367.39
Additional interest from Oct. 9th, 1931 to March 31st, 1937		$ 58,022.16
		$392,382.43

(This Balance is Subject to U. S. Treasurer's Commissions.)

Exhibit A Annexed to Answering Affidavit of Selden Bacon

1993

Under the arrangement made by Mrs. Clara Sielcken Schwarz with the attorneys whom she employed to present that claim before the Mixed Claims Commission, (at her own expense), as this executor is informed and believes, there will be due to her said attorneys from her 20 per cent or more of any further sums received from the Treasury Department on this award. Those attorneys, as this executor is informed and believes, claim to have a lien for such 20 per cent or more on any further sums collected under this Award.

1994

The reason why the balance of this claim under the Award has not been collected is that:

Under the Act of Congress (Act Mar. 10, 1928, C. 167) and the Treaty provisions by which such Mixed Claims Commission was created (agreement between the United States and Germany of date August 10, 1922), the various awards made by the Commission are payable out of the United States Treasury only out of funds received by it from or on account of the German Reich available for the purpose. Since October 9th, 1931 there have been no funds in the United States Treasury deemed by it available for such distribution.

1995

In answer to an inquiry on behalf of this Executor, we have received the following information from the Treasury Department of the United States, which we believe true and correct.

1996 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"TREASURY DEPARTMENT
Office of the Secretary
Washington

Commissioner of
Accounts and Deposits

November 22, 1937.

Duer, Strong and Whitehead,
15 Broad Street,
New York, New York.

1997 Gentlemen:

Receipt is acknowledged of your letter of November 16, 1937, requesting information with respect to further payments out of the German Special Deposit Account, on account of the award made to Crossman and Sielcken by the Mixed Claims Commission, United States and Germany under Docket No. 8304.

(a) The amount on deposit in the German Special Deposit Account or available thereto is approximately $19,800,000, which the Secretary of the Treasury will have to disburse in accordance with the priorities established in Section 4 of the Settlement of War
1998 Claims Act of 1928.

(b) The Secretary of the Treasury has received no official notice from the Secretary of State of the final disposition of applications of the Black Tom claimants. The Treasury is not in a position to state when these claims will be disposed of.

(c) If the so-called sabotage claims are disallowed and the funds available to the German Special Deposit Account are distributed, the American claimants holding Class 3 awards (awards in excess of $100,000) would be entitled to an additional payment under priority No. 5 of approximately 5% on balance due on principal account (award plus interest to January 1, 1928) and a payment under priority No. 8 of approximately 22% on the interest accrued from January 1, 1928 to March 31, 1937. On this award

Exhibit A Annexed to Answering Affidavit of Selden Bacon

the dollar amounts would be approximately as follows:

5%	of balance of unpaid principal of $211,992.88	$10,599.64
22%	of interest accrued from January 1, 1928 to March 31, 1937, aggregating $180,389.55	$39,685.70

If, however, the sabotage claims are allowed, there would be no funds available for distribution after these claimants were paid the same percentage as other Class 3 claimants.

(d) After the distribution of the reserve fund referred to above, no further funds will be available to the German Special Deposit Account until the Government of Germany resumes payments on the reichsmarks bonds deposited with the Treasury under the debt funding agreement of June 23, 1930. No payments have been received on these bonds since September 30, 1931.

Very truly yours,

M. COLLINS.

M. COLLINS,
Assistant Commissioner of
Accounts and Deposits."

The Executor is unable to realize the value of the balance of said Award by a sale thereof because under the provisions of the Acts of Congress no such claims against the United States can be sold or transferred.

The Executor is thus powerless either to collect or to sell this asset of the unpaid balance of this Award and believes the value thereof problematical.

II.

While not in strictness, as this executor is advised and believes, a part of the estate, the Executor also holds

Exhibit A Annexed to Answering Affidavit of Selden Bacon

the various refunding bonds from the residuary legatee set forth in Schedule A-3 hereof.

These have not been collected on beyond the two items of $39,999.20 and $17,967.00 shown in Schedule A for several reasons including the facts that the residuary legatee has for many months past been absent in Germany, and, as far as this Executor has been able to learn, has no available assets in the United States (except the fund on deposit with the Chase National Bank of the City of
2003 New York to secure the last two of the said refunding bonds, which is set forth in Schedule A-3 hereof). She also has asserted to this executor (through her attorneys) that despite the sums distributed to her by this executor out of this estate, as shown in this and the prior accountings, aggregating over $4,000,000, she now has no property left except certain real estate in Germany, which she claims to be unable to sell, or, if sold, to bring the proceeds out of Germany, plus her remaining interest in the said deposit with the Chase National Bank. And she and various of her assignees of interests in said fund (subject to the prior rights of this executor) have indicated opposition to the application of the said fund to
2004 meet the obligations of the estate, except only as consents were given to the two payments out of that fund of $39,999.20 and $17,967.00 shown in Schedule A; and the said Chase National Bank, for its own protection declines to make payments out of such fund otherwise than by unanimous consent of all parties in interest therein, or pursuant to decree of court binding on all such parties.

Adjustment of this account of this executor is moreover, necessary as a basis for any such decree, and for that reason this Executor desires that the said Chase National Bank and all other persons claiming any interest in the said fund on deposit with it be cited to attend this accounting.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken,
Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2005

SCHEDULE C.

DISBURSEMENTS FOR ADMINISTRATION AND OTHER NECESSARY EXPENSES OF SAID ESTATE

1927				
Sept. 15	John L. McMaster, one half of refund from Clerk of United States Supreme Court		$ 16.40	
Oct. 6	Commerce Photo-Print Corporation for photostats		2.40	2006
1930				
Sept. 27	Commerce Photo-Print Corporation for photostats		5.40	
Oct. 18	Cablegram to Brainard Avery		6.90	
Nov. 8	Commerce Photo-Print Corporation for photostats		2.80	
Dec. 12	Commerce Photo-Print Corporation for photostats		1.00	
1931				
Feb. 5	Hamel & Doyle for legal services in re income tax questions	$2,000.00		2007
	and disbursements	56.40		
			2,056.40	
Feb. 5	Commerce Photo-Print Corporation for photostats		3.20	
Mar. 14	Avery & Whiting, at request of residuary legatee, for legal services rendered executor		4,350.00	
July 13	Fidelity & Deposit Company of Maryland premium on bond in Rosenblum suit.....		100.00	
Aug. 21	Leonard B. Smith for disbursements.....		63.70	
Oct. 8	Leonard B. Smith for services as attorney from March 18th, 1927 to October 9, 1931		2,500.00	
Oct. 13	Commerce Photo-Print Corporation for photostats		2.40	
Oct. 14	Commerce Photo-Print Corporation for photostats		1.20	

2008 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Oct. 15	Telephone call to Cleveland, Ohio	2.25
	Oct. 31	Commerce Photo-Print Corporation for photostats	3.00
	Nov. 9	Carfare to Newark and return	.40
	Nov. 20	Commerce Photo-Print Corporation for photostats	.40
	Nov. 23	Commerce Photo-Print Corporation for photostats	.70
	Dec. 5	Commerce Photo-Print Corporation for	
2009		photostats	.75
	Dec. 11	Commerce Photo-Print Corporation for photostats	.80
	Dec. 18	John Kratz for services $25 and disbursements $15.49, in locating papers in office of Alien Property Custodian and securing copies	40.49
	Dec. 23	Duer, Strong & Whitehead for legal services on account	2,500.00
	1932		
	Jan. 6	Commerce Photo-Print Corporation photostats re Chase Bank suit	3.50
2010	Jan. 7	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.75
	Jan. 8	Commerce Photo-Print Corporation photostats re Chase Bank suit	2.00
	Jan. 14	Commerce Photo-Print Corporation photostats re Chase Bank suit	3.75
	Jan. 18	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.20
	Jan. 21	Commerce Photo-Print Corporation photostats re Chase Bank suit	.15
	Jan. 25	Commerce Photo-Print Corporation photostats re Chase Bank suit	9.20
	Jan. 29	Commerce Photo-Print Corporation photostats re Chase Bank suit	1.20
	Jan. 30	Commerce Photo-Print Corporation photostats re Chase Bank suit	.80
	Feb. 1	Benjamin N. Goodglass, stenographer's minutes in Chase Bank suit	988.40

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2011

Feb.	4	Commerce Photo-Print Corporation photostats re Chase Bank suit		22.25
Feb.	10	Commerce Photo-Print Corporation photostats re Chase Bank suit		3.00
Feb.	13	Commerce Photo-Print Corporation photostats re Chase Bank suit		2.80
Feb.	19	Franklin Fireproof Warehouse, Inc. for cartage		50.00
Feb.	27	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit		812.20
Mar.	8	New York Herald Tribune for classified advertisement re Chase Bank suit		3.25
Mar.	9	New York Times for public notice re Chase Bank suit		5.00
Mar.	11	New York Times for classified advertisement re Chase Bank suit		6.00
Mar.	11	Duer, Strong & Whitehead on account of legal services		5,000.00
Mar	14	Avery & Whiting for disbursements		
		re Elfenbein	$371.59	
		re Four Managers' suits	67.45	
				439.04
Mar.	14	Weinberg & Josephson, accountants, services. re income taxes		1,000.00
Mar.	19	Hugh McGuckin for services as accountant re Chase Bank suit		500.00
Mar.	22	Kolesch & Company for photostats re Chase Bank suit		4.80
Mar.	24	Weed & Kennedy, Inc., premium on injunction bond re Rosenblum		100.00
Mar.	24	Commerce Photo-Print Corporation photostats re Chase Bank suit and Rosenblum suit		.40
Mar.	25	Arthur T. Vanderbilt		
		legal services	$1,000.00	
		disbursements	46.40	
		re New Jersey suit		
		Alex W. Sielcken vs. Sorenson et al.		
				1,046.40

2012

2013

Exhibit A Annexed to Answering Affidavit of Selden Bacon

	Mar. 26	Commerce Photo-Print Corporation photostats re Chase Bank suit	.80
	Apr. 6	Nicholas W. Bindseil, Transcript of stenographer's minutes in New Jersey suit Alex W. Sielcken vs. Sorenson *et al.*	45.20
	Apr. 6	Benjamin N. Goodglass, stenographer's minutes in Chase Bank suit	1,134.20
	Apr. 14	Commerce Photo-Print Corporation photostats re Chase Bank suit	6.25
2015	Apr. 16	Hugh McGuckin, services as accountant in Chase Bank suit	500.00
	Apr. 26	Commerce Photo-Print Corporation Photostats	5.00
	Apr. 27	Arthur Terry for services in hearings before Referee Henry F. Wolff in Chase Bank and Rosenblum suits	36.00
	May 2	Commerce Photo-Print Corporation, photostats	7.20
	May 4	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	529.20
	May 4	Duer, Strong & Whitehead, disbursements re Chase Bank suit	5.12
2016	May 20	Hugh McGuckin for Accountant's services in re preparation of answer to petition to open decrees	75.00
	May 21	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	935.50
	June 1	Commerce Photo-Print Corporation, photostats re Rosenblum suit	16.50
	June 14	Benjamin N. Goodglass for stenographer's minutes in Rosenblum case	213.00
	June 14	Telephone call to Toledo, Ohio	8.15
	June 14	Avery & Whiting for services and disbursements, Rosenblum case	539.64
	June 15	Duer, Strong & Whitehead on account of legal services	17,500.00
		for disbursements	90.88
	June 25	Commerce Photo-Print Corporation photostats re Rosenblum suit	.20

Exhibit A Annexed to Answering Affidavit of Selden Bacon.

June	25	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit		355.80
July	8	Stone & Webster Building, Inc., rent of space at 90 Broad Street for records		200.00
July	8	Leonard B. Smith, Esq., for disbursements		129.22
Sept.	1	Commerce Photo-Print Corporation for photostats re Chase Bank suit		24.88
Oct.	3	Franklin Fireproof Warehouse, Inc. storage bill		60.00
Nov.	1	Commerce Photo-Print Corporation photostats re Chase Bank suit		.20
Nov.	17	Avery & Whiting for services in Rosenblum Case		1,000.00
Dec.	8	Commerce Photo-Print Corporation photostats re Chase Bank suit		.80
1933				
Feb.	24	Avery & Whiting in Rosenblum suit for services	$1,350.00	
		disbursements	58.01	1,408.01
Mar.	28	Benjamin N. Goodglass for stenographer's minutes in Chase Bank and Rosenblum suits		144.20
Apr.	7	Commerce Photo-Print Corporation photostats re Chase Bank suit		1.98
Apr.	10	Commerce Photo-Print Corporation for photostats re Chase Bank suit		5.50
Apr.	11	Williams, Eversman & Morgan, Toledo, Ohio, attorneys in Woolson Spice Company suit		
		Retainer	$ 500.00	
		Disbursements	18.59	518.59
Apr.	11	Leonard B. Smith		
		for disbursements	$ 24.05	
		for legal services October 9, 1931 to April 10, 1933	1,500.00	1,524.05

2017

2018

2019

Exhibit A Annexed to Answering Affidavit of Selden Bacon

	Apr.	25	Henry F. Wolff, Esq., for services and disbursements as Referee in Rosenblum suit	2,885.25
	June	16	Henry F. Wolff, Referee's fees, Chase Bank case	9,695.31*
	June	17	Check tax	.02*
			(These last two items were included in the partnership accounting in the Supreme Court and there approved by the Supreme Court judgment of November 8, 1937).	
2021	June	30	Commerce Photo-Print Corporation, photostats re Rosenblum suit	6.60
	July	8	Commerce Photo-Print Corporation photostats re Rosenblum suit	2.82
	Sept.	14	Commerce Photo-Print Corporation photostats re Rosenblum suit	1.44
	Sept.	18	Duer, Strong & Whitehead on account of legal services $15,000.00 disbursements 153.68	
				15,153.68
2022	Oct.	11	Commerce Photo-print Corporation photostats re Rosenblum suit	.89
	Oct.	23	Pioneer Fire Proof Storage Warehouse Corporation storage	50.52
	Nov.	1	Commerce Photo-Print Corporation photostats re Rosenblum suit	1.09
	Nov.	21	Commerce Photo-Print Corporation photostats re Rosenblum suit	.73
	Dec.	18	Commerce Photo-Print Corporation photostats re matter of Sielcken	2.36
	1934			
	Jan.	12	Pioneer Fire Proof Storage Warehouse Corporation, storage	151.56
	Jan.	19	Henry F. Wolff, Esq., for services as Referee, and disbursements in Chase Bank suit	150.80
	Jan.	23	Henry F. Wolff, Esq., for services as Referee, and disbursements re Chase Bank suit	100.24

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Feb.	2	John S. Sorensen for services examining accounts of Crossman & Sielcken	500.00	
Feb.	5	Ballou Press, Printing answer re Sielcken	675.69	
Feb.	8	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
Feb.	20	Ballou Press, printing index to answer	42.42	
Mar.	2	Louis S. Williams Company for photostats re Sielcken	.50	
Mar.	5	Commerce Photo-Print Corporation, photostats re Sielcken	1.33	
Mar.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2024
Mar.	8	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00	
Mar.	15	Commerce Photo-Print Corporation, photostats re Sielcken	.36	
Mar.	15	Benjamin N. Goodglass for stenographer's minutes in Chase Bank suit	12.60	
Apr.	2	Garfield & Wrubel for John S. Sorenson services examining accounts of Crossman & Sielcken	500.00	
Apr.	6	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2025
Apr.	10	Duer, Strong & Whitehead on account of legal services $5,000.00 disbursements 361.82	5,361.82	
Apr.	28	Duer, Strong & Whitehead, on account of legal services	15,000.00	
May	1	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00	
May	2	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
May	4	Commerce Photo-Print Corporation photostats re Sielcken	.18	
May	10	Commerce Photo-Print Corporation photostats re Sielcken	2.67	

2026 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

May	28	G. F. Baur of Hamburg, Germany, services in investigating and securing papers in re transfer 360 shares of Woolson Spice Company stock to Theodor Wille and search re naturalization application of Hermann Sielcken	203.68
May	31	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00
2027 May	31	Williams, Eversman & Morgan, Toledo, Ohio, disbursements in Woolson Spice Company suit	65.83
June	9	Pioneer Fire Proof Storage Warehouse Company, storage of books	50.52
June	9	Mayor & Braun of Basel, Switzerland, services in connection with search for re-naturalization proceeding of Hermann Sielcken in Baden	326.10
July	10	Garfield & Wrubel for John S. Sorenson for services examining accounts of Crossman & Sielcken	500.00
July	10	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
2028 July	12	Collector of Internal Revenue in settlement of 1930 Federal Income Tax	22,192.65
July	16	Commerce Photo-Print Corporation, photostats	19.55
July	20	Duer, Strong & Whitehead on account of legal services $4,500.00 disbursements 93.98	4,593.98
Aug.	10	Commerce Photo-Print Corporation for photostats	1.32
Sept.	5	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	6	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	7	Williams, Eversman & Morgan for disbursement for copy of Ohio depositions in Woolson Spice suit	520.65

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2029

Sept. 7	Duer, Strong & Whitehead, part of expenses of trip of Mr. Bacon to Germany in re proceeding to open decrees		525.00	
Sept. 17	Leonard B. Smith, for disbursements	$ 88.20		
	for services as attorney from April 10, 1933 to September 10, 1934	1,500.00	1,588.20	
Sept. 29	Duer, Strong & Whitehead, on account of legal services	$9,000.00		
	for disbursements	321.14	9,321.14	2030
Oct. 8	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	
Oct. 8	Certified copy of letters and telephone call in Germany re proceeding to open decree		6.48	
Oct. 24	Commerce Photo-Print Corporation, for photostats		2.88	
Oct. 24	Lawyers & Merchants Translation Bureau for translation of German documents		10.98	
Oct. 24	Stone & Webster Building Inc. rent of room for storage of books in re Chase Bank and Rosenblum actions		696.28	2031
Nov. 2	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken		750.00	
Nov. 13	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	
Nov. 20	Charles D. Hamel for Legal services and disbursements re income tax matters, and other matters, paid at request of Clara Sielcken Schwarz		10,345.53	
Nov. 20	Stone & Webster Building, Inc. rent of space for books		60.00	
Nov. 21	A. Veyrassat, of Montreux, Switzerland, for services re investigations in Baden, and disbursements		113.50	
Nov. 30	John S. Sorenson, services on accounts of Crossman & Sielcken		560.00	
Dec. 4	Pioneer Fire Proof Storage Warehouse Company, storage		50.52	

2032 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Dec.	20	Joseph Braun, for services and disbursements in securing documents in Germany	191.77
1935			
Jan.	4	Daniel Levy, accountant, on account for examination books of Crossman & Sielcken	750.00
Jan.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Feb.	7	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
2033 Feb.	16	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken	750.00
Feb.	20	Edna S. Lewis as executrix of Clarence M. Lewis, deceased, for his fees for services as referee to his death	7,500.00
Mar.	2	Check taxes	2.04
Mar.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Mar.	28	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,250.00
Apr.	2	John S. Sorenson, services re accounts of Crossman & Sielcken	460.00
2034 Apr.	8	Joseph Braun, balance of claim for fees and expenses in Germany	210.28
Apr.	9	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Apr.	11	Dr. Foster Kennedy for professional services as witness, selected by referee	350.00
Apr.	12	Thomas F. Falvey for copy of stenographer's minutes	634.50
Apr.	18	Duer, Strong & Whitehead on account of legal services $7,500.00 disbursements 325.90	7,825.90
Apr.	22	Telephone call to Boston re evidence in proceeding to open decrees	1.50
Apr.	23	Copies of "American Bank Attorneys" for 1917, 1918, 1919 and 1920	20.00

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2035

May	24	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	
June	3	Commerce Photo-Print Corporation for photostats	2.04	
June	5	Daniel Levy, accountant, on account, for examination books of Crossman & Sielcken	1,000.00	
June	19	Dr. Arthur Burchard on account of professional services re German law	750.00	
June	20	Pioneer Fire Proof Storage Warehouse Company, storage	50.52	2036
June	26	Thomas F. Falvey for original copy of stenographer's minutes	2,942.25	
July	3	Louis Cohan, copy of minutes in Woolson Spice Company suit	230.75	
July	30	Louis Cohan, copy of minutes in Woolson Spice Company suit	124.25	
Aug.	27	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,000.00	
Sept.	6	Dr. Otto Steinel of Karlsruhe, Baden, Germany, for services and expenses re inquires in Germany for testimony in proceeding to open decrees	201.15	2037
Sept.	21	Commerce Photo-Print Corporation for photostats	7.04	
Sept.	21	Pioneer Fire Proof Storage Warehouse Company, storage	151.56	
Oct.	10	Duer, Strong & Whitehead on account of legal services $20,000.00 disbursements 473.23	20,473.23	
Oct.	22	Thomas F. Falvey, copy of stenographer's minutes of hearings	418.75	
Oct.	25	Commerce Photo-Print Corporation for photostats	.82	
Nov.	29	Daniel Levy, accountant, on account for examination of books of Crossman & Sielcken	1,500.00	
Oct.	31	John S. Sorenson, services on accounts of Crossman & Sielcken	530.00	

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Nov.	6	Louis Cohan, copy of minutes in Woolson Spice Suit	261.75
Nov.	12	Commerce Photo-Print Corporation for photostats	2.02
Nov.	12	Pioneer Fire Proof Storage Warehouse Company, storage	101.04
Nov.	21	Harriet W. Burhan for services in checking files and records	20.00
Nov.	29	Thomas F. Falvey for court transcript of stenographer's minutes	1,353.75

2039

1936

Jan.	6	Pioneer Fire Proof Storage Warehouse Corporation, for storage	101.04
Jan.	28	Dr. John H. Jantzen, Bremen, Germany, for searching for and securing certified copies relating to citizenship of Paul Isenberg, father of residuary legatee	42.18
Jan.	29	Thomas F. Falvey for original transcript of stenographer's minutes	429.75
Jan.	29	Thomas F. Falvey for copy of stenographer's minutes for counsel	522.00

2040

Feb.	3	Telephone call to Washington re certified copies of income tax returns	1.90
Feb.	4	Certified photostatic copies of income tax returns	2.50
Mar.	11	G. F. Baur of Hamburg, Germany, for services in Hamburg, Germany, in checking evidence obtainable in re Sielcken	153.47
Mar.	11	Pioneer Fire Proof Storage Warehouse Corporation	101.04
Mar.	17	Thomas F. Falvey for original transcript of stenographer's minutes and copy of stenographer's minutes for counsel	414.00
Mar.	24	Daniel Levy, accountant, on account, for examination of books of Crossman & Sielcken	1,000.00
May	11	Pioneer Fire Proof Storage Warehouse Corporation, storage	101.04

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June	5	Pioneer Fire Proof Storage Warehouse Corporation, storage	50.52
June	8	Ballou Press for printing executor's brief in proceeding to open decrees	806.82
June	9	Louis Cohan, transcript of depositions in Woolson Spice suit	138.75
June	26	Duer, Strong & Whitehead for disbursements	219.12
July	3	Dr. Arthur Burchard on account of professional legal services re proceeding to open decrees	750.00
			2042
July	28	Pioneer Fire Proof Storage Warehouse Corporation, storage	50.52
July	29	Commerce Photo-Print Corporation for photostats	.56
July	31	Commerce Photo-Print Corporation for photostats	.41
Aug	8	Thomas F. Falvey for original transcript and copy for referee and one copy for counsel	380.00
Aug.	31	Commerce Photo-Print Corporation for photostats	1.23
			2043
Sept.	25	Thomas F. Falvey for original transcript and copy for referee and one copy for counsel	20.00
Sept.	25	Pioneer Fire Proof Storage Warehouse Corporation, storage	101.04
Oct.	19	Duer, Strong & Whitehead for disbursements	222.52
Oct.	20	Pioneer Fire Proof Storage Warehouse Company	50.52
Nov.	13	Pioneer Fire Proof Storage Warehouse Company	50.52
Nov.	23	Louis Cohan, copy of minutes in Woolson Spice suit	10.00
Dec.	5	Pioneer Fire Proof Storage Warehouse Company	50.52
Dec.	16	Ballou Press printing respondent's brief before Surrogate	428.15

2044 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Dec.	16	Ballou Press cost of printing respondent's answering brief in proceeding to open decrees	19.13
Dec.	16	Ballou Press cost of printing respondent's special memorandum re exceptions	101.75
Dec.	23	Ballou Press printing respondent's reply brief	36.47
		1937	
Jan.	13	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Jan.	18	Commerce Photo-Print Corporation for photostats	.41
Jan.	22	Ballou Press, bill for additional cost of reply brief	23.50
Feb.	4	Commerce Photo-Print Corporation for photostats	.41
Feb.	5	Commerce Photo-Print Corporation for photostats	.77
Feb.	13	Thomas F. Falvey for original transcript for Surrogate and copy for counsel 51 minutes of hearing before Surrogate	98.25
Feb.	20	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Apr.	6	Pioneer Fire Proof Storage Warehouse Company, storage	101.04
May	8	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
June	11	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
July	1	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
July	27	Commerce Photo-Print Corporation for photostats	.61
Aug.	5	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Sept.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Oct.	2	Pioneer Fire Proof Storage Warehouse Company, storage	50.52

Exhibit A Annexed to Answering Affidavit of Selden Bacon

Oct.	26	Walter N. Seligsberg, referee, services as per order of Surrogate of October 23, 1937	17,967.00
Oct.	27	Thomas F. Falvey for stenographer's minutes, original and copy for counsel, of hearings before Surrogate on October 8, 1937	9.00
Nov.	4	Pioneer Fire Proof Storage Warehouse Company, storage	50.52
Nov.	9	John Williamson & Sons, of Sydney, Australia, services and disbursements in 1936 in search for witness Coleman	87.20
			$229,867.35

The two starred items of June 16 and 17, 1933, in this Schedule were included in the partnership accounting approved by the Supreme Court judgment of November 8th, 1937, and are referred to in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2050 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule C-1.

ITEMIZED STATEMENT OF ALL UNPAID CLAIMS FOR ADMINISTRATION AND OTHER EXPENSES OF THIS ESTATE.

A.

Unpaid Claims not disputed by the Executor.

2051 i. Claims for Unpaid Costs Awarded by Decree of this Court of May 15, 1937, all bearing interest from that date, payable out of the Estate

To John S. Sorenson			$ 3,523.75
To Chase National Bank, as Ancillary Executor of Thorleif S. B. Nielsen, deceased			3,523.00
To Irving Trust Company as Executor of Hermann Sielcken, deceased		$ 43,129.75	
Less sums taxed as costs, paid out of estate			
Referee's fees—Lewis	$ 7,500.00		
2052 Seligsberg	17,500.00		
and interest.			
Court Stenographer's fees	5,354.75		
Certified Copies	241.05		
Witness fees	363.95		
		30,959.75	12,170.00

(At the time of payment of the fees of the Referee W. N. Seligsberg, Esq. the accrued interest on his claim amounted to $467, so that the actual payment to him was $17,967.)

$ 19,216.75

ii. Claim of Hon. Nathan L. Miller, Counsel for Executor

For services in preparing for argument before the Surrogate, of Matter of Sielcken, on December 16th, 1936, su-

pervising preparation of briefs, and argument, as per his bill, copy of which is filed herewith ..... $ 25,000.00
For Disbursements 32.21

iii. Balance of Claims of Leonard B. Smith, of New York City, attorney and counsel for executor.
For services 2,750.00
For disbursements as per his bills, copies of which are filed herewith 47.00 2054

iv. Balance of Claims of Duer, Strong & Whitehead, of New York City, attorneys and counsel for Executor.
Their claims are for services in all the multitudinous litigation in which the executor has been involved since November, 1931; and in advising as to manifold details of the administration, including negotiations for settlement of litigation. These services include those of Mr. Selden Bacon, senior member of that firm, and are set forth in the bills presented by them to the Executor, of which copies are herewith filed. 2055
For Services 218,400.00
For Disbursements 3,007.66 221,407.66

on which there have been paid as shown in Schedule C
For Services on account .. $101,000.00
For Disbursements 2,787.27 103,787.27

leaving an unpaid balance of claim of .. $117,620.39
plus interest.

v. Claim of Williams, Eversman & Morgan of Toledo, Ohio.
Their claim is for services as local counsel in Toledo, Ohio, for this Executor in the suit instituted by Mrs. Clara Sielcken Schwarz in the Court of Common Pleas for Lucas County, Ohio, against the Wool-

2056 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

son Spice Co., this Executor and others, in which she sought to recover several million dollars. Their bill is for an unpaid balance for services	$ 4,500.00	
(Their total bill for services was $5,000, of which $500 has been paid, as shown in Schedule C.)		
and unpaid balance of disbursements .... and interest from April 30, 1937	36.59	
2057		4,536.59

Copy of their bill is herewith filed.

vi. Balance of Claim of Daniel Levy, Certified Public Accountant, New York City.

Owing to the attack in the proceeding in Matter of Sielcken on the settlement of 1917 with Sorenson and Nielsen, and the refusal of the Referee to pass on the questions of estoppel and laches affecting such claim, and other attacks in that proceeding on transactions affecting the liquidation of the affairs of Crossman & Sielcken, it was necessary to prepare before the Executor started to introduce its proofs evidence of the propriety of those transactions, including a careful showing of all relevant matters appearing on the books and records of that firm. Mr. Levy did this work and had completed the preparation of that work before the petitioner in that proceeding on September 10th, 1935, withdrew the claims she had made on those scores.

2058

Mr. Levy's charges amounted in all to $9,000, of which $8,000 has been paid, as shown in Schedule C. Balance claimed by Mr. Levy ..... $ 1,000.00

Copy of Mr. Levy's bill is filed herewith.

Total unpaid claims not disputed by executor $170,202.94
plus interest.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2059

This Executor has examined the said bills of its said attorneys and counsel, namely Hon. Nathan L. Miller, Leonard B. Smith, Esq., Duer, Strong & Whitehead, Esqs., and Williams, Eversman & Morgan, Esqs., and believes that the services therein claimed to have been rendered have all been rendered satisfactorily, and that in view of the magnitude and complexity of the matters involved and the large amount of time required to present these matters and the success attained in handling the same, such charges are reasonable and fair.

2060

The work of Mr. Daniel Levy as accountant was very elaborate and prolonged and his work which has been examined by this executor was carefully done and the amount of time consumed by him in such work was, as this executor is advised and believes, reasonably to be compensated, at the usual rates, at the sum of $9,000 claimed by him. The work so done by Mr. Levy, so far as it affected the claim of said Terijon Weitling, was put at the service of the residuary legatee in connection with her defense of that claim, and the services of Mr. Levy in connection with those items were availed of by her in such defense.

2061

B.

In Schedule D-3, in addition to disputed claims against the estate, are shown certain claims made against the executor, for services, etc., claimed to have been rendered it in the administration of the estate, which claims the Executor disputes.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2062 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule D.

CLAIMS OF ALLEGED CREDITORS OF THE TESTATOR PRESENTED TO OR WHICH HAVE COME TO THE KNOWLEDGE OF THE EXECUTOR.

Claim of Terijon Weitling.

Prior to the death of Hermann Sielcken, Weitling was employed as a salesman in the Foreign Department of Crossman & Sielcken on a salary plus commissions of ten per cent of the net profits of his department.

2063 In late 1917, after the death of Sielcken, settlement was made with him and he executed a release of all claims, but, apparently, neglected to affix his seal thereto.

The claim he asserts by his action is that the 1930 recovery from the Zentral Einkaufs Gesellschaft was all profit of 1916-1917 and that he is entitled to ten per cent of the nominal amount thereof, irrespective of his release and settlement, and also irrespective of the terms of the compromise of that judgment under which a full half of the nominal recovery was repaid to the Zentral Einkaufs Gesellschaft and $50,000 thereof paid to Theodor Wille pursuant to the compromise as set forth in Schedule I hereof, and also irrespective of all expenses incurred in

2064 recovering the same.

On a first trial of his action it was dismissed by reason of releases executed by him. He appealed therefrom and was awarded a new trial on the grounds stated in the opinion of the Appellate Division on his appeal reported in 241 A. D. 377, which were in substance that the releases in question were possibly ambiguous and subject to explanation by oral evidence. On the second trial a verdict was rendered on March 5, 1937, against his claim based on the plaintiff's own evidence. From the judgment thereon entered March 10th, 1937, dismissing his action Weitling has again appealed to the Appellate Division for the First Department, and his appeal therefrom is there now pending.

The claim Weitling has advanced is for ten per cent of the gross $726,681.40 paid to Sorenson and Neilson as surviving partners of Crossman & Sielcken by the Treasurer of the United States on the 23rd day of April, 1930, in satisfaction of the decree of the United States

Exhibit A Annexed to Answering Affidavit of Selden Bacon

District Court against the Zentral Einkaufs Gesellschaft and the United States, Treasurer and Alien Property Custodian, as set forth in Schedule I hereof, irrespective of the terms of the compromise settlement under which collection was made, and irrespective of the expenses incurred in making such recovery; irrespective too of his prior releases of any such claim, and interest thereon, or approximately $104,000 and costs. Such claim is believed to be wholly invalid. 2065

In January, 1933, this Executor desired to change the attorneys who had appeared for it in this Weitling case and in the allied actions brought by the other three Export Managers, and then requested the retirement of such attorneys in those causes. The residuary legatee, Mrs. Clara Sielcken-Schwarz, desired to have the attorneys who had so appeared, continue in charge of the case, and to accomplish that result undertook with the Executor to be entirely responsible for the outcome of said four actions, and for the subsequent expenses of all that litigation, she to have the privilege of herself employing such attorneys and counsel in those four cases as she saw fit. Since that date that litigation has been entirely conducted by her under and pursuant to that arrangement. 2066 2067

The other three "Managers' suits," of Budelman, Kirkpatrick and James W. Smith, the said Clara Sielcken Schwarz settled after the first judgment against their claims, by paying them $10,000 each, and taking releases from them. The executor at her request made distribution to her of those amounts for that purpose, as more fully appears in Schedule F hereof.

Weitling in his complaint claimed, as this executor is informed and believes, a preference for any recovery he may make on all the assets received by the executor from the firm of Crossman & Sielcken, as an alleged debt of that firm, all other indebtedness of the firm having been discharged.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2068 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule D-1.

STATEMENT OF CLAIMS ON WHICH JUDGMENT OR DECREE HAS BEEN RENDERED AGAINST YOUR ACCOUNTANT.

The only claims on which any Judgment or Decree has been rendered against your accountant are the two following:

2069 (a) Claim of the United States for an alleged deficiency in income taxes for the years 1930 and 1931 predicated on the recoveries from the Zentral Einkaufs Geselischaft and under the Award of the Mixed Claims Commission—United States and Germany, on the claim against Germany and the firm of Theodor Wille. The Internal Revenue Department of the United States assessed on November 27th, 1933, a deficiency in income taxes for those years of $141,962.58 and interest thereon at 6% from March 15, 1931, on $122,631.18 and from March 15, 1932, on $19,331.40 amounting in the aggregate at the time the claim was finally disposed of to approximately $182,000. From that assessment for a deficiency in income taxes
2070 the executor appealed to the United States Board of Tax Appeals, where that appeal was heard and argued. After the case had been argued the United States offered to compromise its said claim for about $182,000, for the sum of $22,192.65. This offer was accepted by the Executor with the approval of the residuary legatee and her counsel, and by stipulation between the United States and this Executor a decree was entered by the said Board of Tax Appeals, awarding a deficiency tax against the Executor and in favor of the United States of $18,500 and interest from March 15th, 1931, which decree of the Board of Tax Appeals was entered on the 11th day of July, 1934; and the Executor paid the same including the interest out of the Estate in its hands on the 12th day of July, 1934, as shown in Schedule C hereof, the decree with interest to the day of payment amounting to $22,192.65.

(b) In the Weitling case the Appellate Division in reversing the first judgment against Weitling awarded costs

to abide the event of the action by its order of reversal of date June 15th, 1934. As, on the second trial, judgment was again awarded against Weitling, no sum of costs has been awarded against the executor.

If ultimately any judgment ever be recovered by Weitling the residuary legatee has assumed all responsibility therefor. Any such judgment if any be recovered will run against the Executor and it should be protected accordingly under the refunding bonds and deposit securing the same set forth in Schedule A-3. 2072

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

Schedule D-2.

PERSONAL CLAIMS OF THE ACCOUNTING PARTY AGAINST THE ESTATE.

2073

None, except for its commissions of which computation is set forth in Schedule J and claims to recover under the refunding bonds set forth in Schedule A-3 for sums sufficient to meet unpaid obligations of the Estate; and for the unpaid costs awarded it by the decree of this Court of May 15, 1937, set forth in Schedule C-1 hereof.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2074 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE D-3.

CLAIMS DISPUTED BY EXECUTOR, AND SUBMITTED FOR THE COURT'S DECISION.

In addition to the claim of Terijon Weitling against the firm of Crossman & Siecken set forth in Schedule D, the following claims are asserted against the executor and are disputed by it.

2075

a) *Claim of Dr. Arthur Burchard, a member of the German bar, resident in New York City, employed to investigate and testify as to certain features of the German law of Wills, in Matter of Sielcken.*

Total Claim	$2,580.00
Already paid, as shown in Schedule C	1,500.00
Balance claimed	$1,080.00

Dr. Burchard was employed with the agreement that he should be paid $15 an hour for all time necessarily
2076 employed in the matter for thoroughly investigating and testifying as to certain features of the German law bearing on the validity of the so-called "Joint Testament" signed by the said Herman Sielcken and his wife the said Clara Sielcken Schwarz in February, 1917, in the case of Matter of Sielcken.

Dr. Burchard claims to have spent 172 hours in the matter. The Executor, while unable to contradict Dr. Burchard's assertion that he spent this amount of time, believes that a large amount of the time so spent by him (according to his statement) was spent on questions of general German law not so submitted to him, and immaterial to those questions; and believes that the time necessarily employed by him on the subjects he was asked to investigate, was fully compensated at the agreed rate of $15 an hour, by the payments already made him aggregating $1,500.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2077

The executor prays that he be cited to give him opportunity to present his claim and proofs thereof, and that this court determine the proper amount of his claim.

b) *Claim of Mildred Elfenbein as surviving partner of the firm of Maurice J. Elfenbein & Co. for services as Accountants.*

This claim is now pending in an action in the Supreme Court for New York County instituted by the claimant 2078
against John S. Sorenson, Clara Sielcken Schwarz, Brainard Avery and this Executor.

This executor denies that it ever employed the Elfenbeins or either of them and denies that they or either of them ever rendered any services to this executor or this estate.

Moreover such services as the plaintiff in that action seeks to recover for, this Executor maintains, were rendered in hostility to this executor and the estate pursuant to an employment by John S. Sorenson (said John S. Sorenson at that time was claiming to be entitled to recover 12 1/2 per cent of the recoveries of 2079
1930 in the action against the Zentral Einkaufs Gesellschaft and others and the award of the Mixed Claims Commission, and also claiming to be entitled, as sole surviving partner of the former firm of Crossman & Sielcken, to liquidate the assets and affairs of that firm, instead of this executor).

Both of those claims of said Sorenson were held invalid by the judgment of the Supreme Court for New York County entered on November 11th, 1933, in the Chase National Bank action, mentioned in Schedule A-1 of this Account.

Such services of the said Elfenbein & Co. had been rendered in support of the said claims of said Sorenson which were so disallowed.

Prior to the decision in the Chase National Bank action said Sorenson had given said Elfenbeins a note

2080 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

to cover their services, signed by him as *surviving partner* of Crossman & Sielcken.

That note the Elfenbeins endorsed without consideration to one Rosenblum, who, on the strength of service of summons on Sorenson (as surviving partner), entered a default judgment on said note, and then sought to enforce the same against the assets that had come from the partnership to this Executor, which then brought an action in the Supreme Court in which the said judg-
2081 ment so obtained by Rosenblum was set aside as covinous.

Subsequently, the active partner in said Elfenbein firm died, and the surviving partner instituted the pending action. In that action said Brainard Avery has been examined as a defendant before trial, by the plaintiff and has testified, on such examination, that before most of the alleged services were rendered, the said Elfenbein & Co. were in terms notified by him that the Executor had declined to employ them; and also there testified that the said Elfenbein & Co. asserted that if this Executor would not pay
2082 them, they would use the information they had acquired in investigating the claim of said Sorenson, in other quarters, and that the data prepared by said Elfenbeins were subsequently used in hostility to the Executor in support of the suits instituted against the Executor by the Four Export Managers, each of whom claimed to be entitled to ten per cent of the recovery from the Zentral Einkaufs Gesellschaft and sued therefor. Three of those claims were adjudged invalid and the three claimants subsequently executed releases of their claims The fourth of those Four Managers (Weitling), still attempts to assert his claim as shown in Schedule D.

The Elfenbein claim is believed wholly baseless as far as concerns this executor.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2083

c) *Claim of Alexander Wendroth Sielcken, son of residuary legatee, for a balance of $30,000 and interest thereon for services rendered by him in connection with the recoveries from the Zentral Einkaufs-Gesellschaft and under the Award of the Mixed Claims Commission—United States and Germany—against Germany and the firm of Theodor Wille.*

This claim has never been presented formally as a claim against the Estate or the Executor. 2084

Alexander Wendroth Sielcken was not employed by the Executor to render those services, but by his mother, the residuary legatee, who had undertaken to assert those claims entirely at her own expense.

She did request the Executor to pay $60,000 to him for those services, and the Executor on November 11th, 1930, paid him the sum of $30,000 for them on her account, and has charged the same in Schedule F hereof as a distribution to her as residuary legatee.

This executor wholly rejects such claim as a claim against it or the estate. And further alleges that the payment of $30,000 so made to him on November 11th, 2085
1930, fully covered the value of all services so rendered by him, and more than six years have expired since the rendition of such alleged services and no proceeding to recover same has been brought by him.

d) *Claim of Clara Sielcken Schwarz asserted in the Court of Common Pleas for Lucas County, Ohio:*

In that proceeding said Clara Sielcken Schwarz claimed to have been defrauded by the conduct of this Executor in selling some 824 shares of Woolson Spice Company stock in 1918 to the extent of three million dollars or more.

The sale of those shares by the Executor was confirmed by the decree of this Court of July 7th, 1921, which decree said Clara Sielcken Schwarz sought to vacate in a proceeding in this court, which this Court re-

fused to vacate by its decree of May 15, 1937, which latter decree is now final.

Since the dismissal of her appeal from the decree of May 15th, 1937, counsel for Mrs. Clara Sielcken Schwarz have advised this executor that they propose to abandon the Ohio suit and negotiations for its dismissal on the merits are now pending and are expected to culminate in such dismissal very shortly, and papers providing for such dismissal have been approved by coun-
2087 sel, and sent to Mrs. Sielcken-Schwarz in Germany, for execution by her.

The refusal of this court to vacate its decree of July 7th, 1921, confirming the said sale is believed to be a complete bar to any recovery against this executor by said Clara Sielcken Schwarz in that Ohio suit.

Unless this suit be abandoned as contemplated, the executor may be subjected to further expenses for its defense therein.

e) *Claim of Clara Sielcken Schwarz for reimbursement of sums paid by her for storage of books and pa-*
2088 *pers of Crossman & Sielcken.*

Early in 1925 the affairs of the partnership being supposedly fully liquidated, the executor surrendered to Mrs. Clara Sielcken Schwarz, as residuary legatee, the bulk of the books and papers of the firm of Crossman & Sielcken. She stored these in the Pioneer Warehouses in Brooklyn, and in February, 1935, presented a claim against this executor for storage that she paid up to January 16, 1935, for one room, and up to February 1, 1935, for a second room amounting in all to $5,132. As these books were taken over and retained by Mrs. Sielcken, who asserted her possession thereof as against any right of the executor thereto, this executor refused to pay her said claim, and now disputes the same as a sum not due from the executor.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2089

f) *Claim of Pioneer Warehouses for Storage.*

After Feburary, 1935, Mrs. Sielcken refused to pay the Pioneer Warehouses for the storage of these books and papers and the Pioneer Warehouses has asserted a claim against the executor for the rental of these rooms at $28 per month for one of them from April 1, 1935, and at $15 per month for the other from March 16, 1935. To December 16, 1937, these claims amount to $1,434. The executor disputes this claim and denies 2090
responsibility for the storage of these documents in those rooms, which have not been under its control during either the period when Mrs. Sielcken Schwarz paid the storage thereon, or the period since then for which the Pioneer Warehouses claim compensation.

g) *Possible claim of the Tax Commission of the State of New York for an additional transfer tax on the Estate of Hermann Sielcken, deceased, by reason of the additional value of the estate's interest in the firm of Crossman & Sielcken due to the items of assets of that firm first discovered in 1927 and re-* 2091
covered in 1930.

No such claim has been so far asserted by the Tax Commission. Whether one will be or not is uncertain. The circumstances affecting any such possible claim are set forth in Schedule I of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2092 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE E.

CLAIMS OF CREDITORS PAID BY EXECUTOR SINCE MARCH 17TH, 1927.

NONE.

Note. (The only sums paid on account of any such claims were the following sums paid by the residuary
2093 legatee personally, in settlements of four suits, all responsibility for three of which had been assumed by her. As to the fourth suit (Stewart), she individually was a defendant as well as the executor, and she individually made a settlement with the plaintiff in that suit entirely on her own responsibility, as the executor was advised and believed that the claim against the Estate was without merit, and that it had a complete defense thereto, as shown by its answer in that suit.

The funds which she used in making these settlements of these suits were, however, distributed to her as legatee at her request by the executor, and are charged as
2094 payments to her in Schedule F. These sums were

1933			
Apr.	27	Stewart (part of $14,000 check)	$10,000
Sept.	12	Budelman	10,000
Sept.	12	Kirkpatrick	10,000
Sept.	12	J. W. Smith	10,000

There were also the sums allowed in the settlement of the claims asserted against Zentral Einkaufs Gesellschaft and against Theodor Wille and the German Reich, set forth in Exhibit A-1. These have not been charged to the Estate, but the settlement and the allowance thereby made were approved by the judgment of the Supreme Court for New York County of November 8th, 1937, on the partnership accounting before it.)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2095

SCHEDULE F.

PAYMENTS TO RESIDUARY LEGATEE, OR TO OTHERS FOR HER ACCOUNT AND AT HER REQUEST, CHARGED TO HER AND CREDITED TO EXECUTOR.

1927			
Mar.	Check to residuary legatee, Clara Sielcken Schwarz	$1,976.87	
Nov. 26	George Osborne for Notarial certificates for Mixed Claims Commission	11.25 ~~11.26~~	2096
1930			
May 14	Arthur Terry for accountant's services to legatee re claims before United States District Court and Mixed Claims Commission —United States and Germany	127.50	
May 14	William Martin for accountant's services to legatee re claims before United States District Court and Mixed Claims Commission —United States and Germany	375.00	
May 21	Clara Sielcken Schwarz for expenses re United States District Court suit and Mixed Claims Commission cases	61,657.94*	2097
June 19	Barnes, Avery & Whiting account legal services to Clara Sielcken Schwarz in same cases	100,000.00*	
June 27	William Martin account Accountant's services to Clara Sielcken Schwarz in same cases	364.50*	
June 28	Arthur Terry account Accountant's services to Clara Sielcken Schwarz	60.00*	
Aug. 13	Photostats for Clara Sielcken Schwarz	8.80*	
Nov. 5	Avery & Whiting account legal services to Clara Sielcken Schwarz re recoveries of 1930, etc.	56,000.00*	
Nov. 5	William Martin account Accountant's services to Clara Sielcken Schwarz	2,000.00*	
Nov. 5	John S. Sorenson account services to Clara Sielcken Schwarz re claims in United States District Court and before Mixed Claims Commission	4,000.00*	

2098 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Nov. 5	Avery & Whiting (to remit to Fred Wirth) for services re claims in United States District Court and before Mixed Claims Commission	2,000.00*
	1930		
	Nov. 11	Alex. W. Sielcken for services to Clara Sielcken Schwarz re claims in United States District Court and before Mixed Claims Commission	$30,000.00*
2099	Nov. 14	Photostats of T. S. B. Nielsen letter of November 11, 1930	2.00*
	1931		
	Feb. 4	Chase National Bank for account residuary legatee	238,616.60
		Chase National Bank for account residuary legatee (United States Treasury Notes with all unpaid coupons)	100,000.00
	Feb. 5	William Martin for Accountant's services to legatee	1,027.58
	Feb. 16	William Martin for Accountant's services to legatee	228.75
2100	1931		
	Mar. 14	Barnes, Avery & Whiting, services to Clara Sielcken Schwarz (part of $5,000 check)	650.00
	Mar. 31	Alexander Wendroth Sielcken, services to Clara Sielcken Schwarz	10,000.00
	Apr. 4	Avery & Whiting, services to Clara Sielcken Schwarz re Sorenson claims	12,500.00
	Apr. 9	William Martin, Services as Accountant re Mixed Claims Commission	316.00
	Apr. 28	Barnes, Avery & Whiting for legal services re 1930 recoveries	39,999.20
	May 2	Price, Waterhouse & Co., services as Accountant re Mixed Claims Commission	821.26
	May 23	William Martin, services as Accountant re Mixed Claims Commission	657.25
	June 22	Universal Audit Co., services as Accountant re Mixed Claims Commission	162.50
	July 9	William Martin, services as accountant	481.40

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2101

July	24	William Martin, services as accountant	495.75
Oct.	19	William Martin, services as accountant	1,000.00
Nov.	12	Avery & Whiting, services to Clara Sielcken Schwarz	5,000.00
Dec.	10	William Martin, services to Clara Sielcken Schwarz as accountant	1,915.18
1932			
Jan.	4	Newton D. Baker, legal services to Clara Sielcken Schwarz and disbursements	2,754.47
Jan.	8	Barnes, Avery & Whiting, account services re 1930 recoveries	30,279.47*
		Tibbets, Lewis & Rand	3,000.00*
Jan.	8	Clara Sielcken Schwarz	3,000.00
Mar.	1	William Martin, services as accountant to Clara Sielcken Schwarz	2,819.25
Mar.	12	Avery & Whiting (Part of check for $2,168.81)	1,729.77
June	13	William Martin, services as accountant to legatee	1,074.74
June	14	Avery & Whiting, part of check for $887.99	348.35
		Avery & Whiting, for legal services to Clara Sielcken Schwarz	5,000.00

2102

2103

1933			
Feb.	8	Clara Sielcken Schwarz	10,000.00
Apr.	27	Clara Sielcken Schwarz ($10,000 for use by her in Stewart settlement)	14,000.00
June	9	Benjamin N. Goodglass, for reporting examination before trial in Four Managers' suits, expense assumed by Clara Sielcken Schwarz	543.00
Aug.	11	Olcott, Paul & Havens, fees for services in Four Managers suits, assumed by Clara Sielcken Schwarz	2,500.00
Sept.	12	Gregory, Stewart & Montgomery, attorneys for Budelman, Export Manager, Settlement payment for account Clara Sielcken Schwarz	10,000.00
Sept.	12	Gregory, Stewart & Montgomery, attorneys for J. E. Smith, Export Manager, settlement payment for account Clara Sielcken Schwarz	10,000.00

2104 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Gregory, Stewart & Montgomery, attorneys for Kirkpatrick, Export Manager, settlement payment for account Clara Sielcken Schwarz	10,000.00
1933 Sept. 28	Tibbetts, Lewis & Rand, services to Clara Sielcken Schwarz re Three Name Account	2,500.00*
	Total	$782,004.39

2105 NOTE. The starred items in this Schedule F appeared in the partnership accounting and were approved by the judgment of the Supreme Court of November 8th, 1937. They are starred here because of the later references thereto in Schedule K of this account.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2106

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2107

SCHEDULE G.

PROPERTY REMAINING IN THE HANDS OF YOUR ACCOUNTANT.

Cash		$ 435.59
Uncollected balance of Award of Mixed Claims Commission, shown in Schedule B-1		
Principal	$211,992.88	
Interest to March 31, 1937 (and subsequently accruing interest)	180,389.55	2108
Total		$392,818.02

In addition the Executor holds the refunding bonds, shown in Schedule A-3, to meet obligations of the estate.

The above-mentioned balance of award of the Mixed Claims Commission is at present uncollectible and its value problematical as shown in Schedule B-1.

December 1, 1937.

IRVING TRUST COMPANY, 2109
As Executor of Hermann Sielcken, Deceased,
By JOHN F. MCILWAIN,
Assistant Secretary.

2110 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE H.

List of Legatees, Claimants, Etc.

The only person now entitled as legatee, trustee, surviving spouse, devisee, distributee or otherwise to a share of the estate or fund, is Clara Sielcken Schwarz, widow of the Testator. This accountant is informed and believes that she now resides at Buena Vista Avenue, Rumson,
2111 Monmouth County, New Jersey. She has, as this executor is informed and believes, been absent in Germany for many months, where her post office address is "Klopstockstrasse 3, Sontenay, Hamburg, Germany."

She is entitled as residuary legatee to all remaining estate after satisfaction of all claims against it.

The approximate value of her interest in the estate as such legatee is nothing.

She is of full age, competent and *sui juris*.

The records of this court have been searched for powers of attorney and assignments and incumbrances made or executed by her, and no such document has been
2112 found.

Various powers of attorney have from time to time been given, as this executor is informed and believes, by said Clara Sielcken Schwarz to August Kern, whose office address is 14 Wall Street, New York City, to Alexander W. Sielcken, whose office address is 11 West 42nd Street, New York City, and (by substitution) to George E. Warren, whose office address is care of The Chase National Bank of the City of New York, 18 Pine Street, New York City, but none of these powers of attorney, so far as this executor is informed and believes, or has been able to learn, have contained any power to the attorney thereby appointed to sell, transfer or encumber any interest of the residuary legatee in this estate.

Other legatees named in the Will were:

John S. Sorenson, a legacy of $50,000; Thorleif S. B. Nielsen, a legacy of $50,000; both of which legacies were paid in 1921 and their receipts and releases were

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2113

filed in this Court in 1925, prior to the third accounting herein, as appears on the face of that account.

The Josephinen Heim of Baden-Baden, Germany, which renounced its legacy by written instrument duly filed in this court with and at the time of the second account of this executor, 1922.

The City of Baden-Baden, Germany, which renounced its legacy by a written instrument duly executed and acknowledged and filed in this Court with the third ac- 2114
count of the executor, in 1925.

Other additional legatees named in the will were Lina Kraft, Heinrich Seidel and the Chief-Gardner Brinkman; all legacies to them were however on condition that they be still in the employ of the testator at the time of his death. Each of these legacies lapsed because no one of the three was in the employ of the testator at the time of the testator's death, as was shown upon the second accounting herein, as of January 1st, 1922.

CLAIMANTS— 2115

Alleged Creditor of Decedent.

Terijon Weitling, not a relative of decedent, whose post office address is 195 Fingerboard Road, Staten Island, New York, whose claim has been adjudged invalid, by judgment entered in the office of the Clerk of the County of New York on the 15th day of June, 193, but who has appealed to the Appellate Division for the First Department from the judgment dismissing his action. His interest in the estate is believed to be 0

Claim against the Executor and the Estate.

Possible claim of the State Tax Commission of the State of New York, not a relative of

2116 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

the decedent, whose address is Albany, N. Y., for an additional transfer tax. The amount of this claim, if any, is believed to be 0

Undisputed Unpaid Claims.

John S. Sorenson, not a relative of decedent, whose address is 757 Carroll Street, Brooklyn, New York $ 3,523.75
2117 and interest from May 15, 1937.

The Chase National Bank of the City of New York, as Ancillary Executor of Thorleif S. B. Nielsen, deceased, not a relative of decedent, whose address is 18 Pine Street, New York City $ 3,523.00
and interest from May 15, 1937.

Irving Trust Company, not a relative of decedent, whose address is 1 Wall Street, New York City $ 12,170.00
and interest thereon from May 15, 1937.

2118

The three last above items are for unpaid costs awarded by this Court payable out of the estate, by its decree of May 15, 1937.

Hon. Nathan L. Miller, not a relative of decedent, whose address is 15 Broad Street, New York City $ 25,032.21
with interest from July 1, 1937.

Leonard B. Smith, not a relative of decedent, whose address is 230 Park Avenue, New York City $ 2,797.00

Duer, Strong & Whitehead, not relatives of decedent, whose address is 15 Broad Street, New York City $117,620.39
with interest on $113,461.44 from May 18, 1937.

Williams, Eversman & Morgan, not relatives of decedent, whose address is Second National Bank Building, Todedo, Ohio $ 4,536.59

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2119

with interest from April 30th, 1937.

Daniel Levy, not a relative of decedent, whose address is Knickerbocker Building, Broadway and 42nd Street, New York City $ 1,000.00

Claims Against the Executor Disputed by It.

Dr. Arthur Burchard, not a relative of decedent, whose address is 501 Fifth Avenue, New York City $ 1,080.00 2120

Mildred Elfenbein, as surviving partner of the firm of Maurice J. Elfenbein & Company, care of Samuel Weinstein, Esq., 225 Broadway, New York City $ 8,735.00
and interest from October 30, 1930.

Alexander Wendroth Sielcken, adopted son of decedent, but claiming only as creditor, whose address is 11 West 42nd Street, New York City $ 30,000.00

Clara Sielcken Schwarz, widow and residuary legatee, address Klopstockstrasse 3, Sontenay, Hamburg, Germany, claim asserted in the Court of Common Pleas for Lucas County, Ohio. This claim it is believed is being withdrawn 0 2121

A second claim by Clara Sielcken Schwarz (address as above stated) to be reimbursed sums paid by her for storage $ 5,132.00

Pioneer Warehouses, no relation to decedent, whose address is 41 Flatbush Avenue, Brooklyn, New York, claim for storage $ 1,434.00

CLAIMANTS OF FUND ON DEPOSIT IN THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK TO SECURE REFUNDING BONDS.

The Chase National Bank of the City of New York, not a relative of decedent, whose address is 15 Broad Street, New York City; claim for commissions as depositary of fund Amount unknown.

2122 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Claimants of interests in the Fund so on deposit in the Chase National Bank, but subject to rights of this Executor therein.

Emilie Bender and Brainard Avery as substituted Trustees (in place of New York Trust Co.), no relation to decedent, their post office address is care of Avery & Whiting, Esqs., 100 Broadway, New York City, about $20,000.00

2123

The following named persons make claims against the balance of said fund under a blanket assignment thereof as security for the aggregate sum of $200,000:

Brainard Avery, not a relative of decedent, whose post office address is 100 Broadway, New York City.

Howard Hasbrouck, not a relative of decedent, whose post office address is 100 Broadway, New York City.

George W. Alger, not a relative of decedent, whose post office address is 50 Broadway, New York City.

2124 I. Gainsburg, not a relative of decedent, whose post office address is 40 Wall Street, New York City.

Isaac H. Levy, not a relative of decedent, whose post office address is 70 Pine Street, New York City.

Newton D. Baker, not a relative of decedent, whose post office address is 1956 Union Trust Building, Cleveland, Ohio.

Raymond T. Jackson, not a relative of decedent, whose post office address is 1956 Union Trust Building, Cleveland, Ohio.

Harold W. Fraser, not a relative of decedent, whose post office address is 710 Home Bank Building, Toledo, Ohio.

Charles H. Kelby, not a relative of decedent, whose post office address is 70 Pine Street, New York City.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2125

John G. Saxe, not a relative of decedent, whose post office address is 102 Maiden Lane, New York City.

Joseph M. Proskauer, not a relative of decedent, whose post office address is 11 Broadway, New York City.

Leonard P. Moore, not a relative of decedent, whose post office address is 25 Broadway, New York City.

James D. Miller, not a relative of decedent, whose post office address is 7 Dey Street, New York City.

2126

William Martin, not a relative of decedent, whose post office address is 117 Liberty Street, New York City.

Charles D. Hamel, not a relative of decedent, whose post office address is Shoreham Building, Washington, D. C.

Bank of Valley Stream, no relation to decedent, whose address is c/o Superintendent of Banks, 80 Centre Street, New York City.

Superintendent of Banks of the State of New York, no relation to decedent, whose address is 80 Centre Street, New York City.

2127

Marie F. Barnes, as Executrix of Earl B. Barnes, deceased, no relation to decedent, claims an interest in sums that may be recovered by Brainard Avery, her post office address is 145 Beaumont Street, Brooklyn, New York.

All of the above named persons are of full age, competent and *sui juris*.

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2128 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

SCHEDULE I.

STATEMENT OF ESTATE AND TRANSFER TAXES PAID SINCE THE PREVIOUS ACCOUNTINGS.

NONE

As shown in Schedule C, certain income taxes amounting to $22,192.65 were paid to the United States. No
2129 other taxes have been paid on the estate since the last prior accounting. There may however be a

Possible Claim of Tax Commission of the State of New York against the Estate of Hermann Sielcken for an additional Transfer Tax on the Estate by reason of Additional Realization on the Estate's Interest in the Assets of the Firm of Crossman & Sielcken due to the Discovery of additional Assets of that Firm in May, 1927, until then entirely unknown to the Executor.

No such claim has yet been asserted by the State Tax
2130 Commission, and if any be asserted it will be disputed by the executor.

The interest of this estate in the firm of Crossman & Sielcken was appraised as an entity in the report of the Tax Appraiser by the decrees of this Court of November 21st, 1919, and November 27th, 1923, at a total of $4,299,579.27. Transfer taxes were accordingly fixed by those orders and were fully paid by the executor prior to 1924 as shown by its prior accountings herein.

By the terms of the copartnership articles, the executor of Hermann Sielcken, upon the dissolution of that firm, was entitled, and charged *as such executor* with the duty of liquidating the firm's affairs, to the exclusion of the surviving members of the firm, John S. Sorenson and Thorleif S. B. Nielsen. The liquidation was so conducted; and that the executor had this right and duty was finally adjudged by the Supreme Court in the case of Chase National Bank of the City of New York as

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2131

ancillary executor of Thorleif S. B. Nielsen against John S. Sorenson, the Irving Trust Company as executor of Hermann Sielcken, and Clara Sielcken Schwarz, by judgment entered on November 11, 1933, in the office of the clerk of the county of New York.

On March 18, 1927, it was believed by the executor that the entire interest of the estate in the firm of Crossman & Sielcken had been fully realized on and all debts of that firm paid and the firm fully liquidated. Late in March, 1927, as of March 18, 1927, the executor rendered its voluntary account (since approved by judgment of the Supreme Court for New York County entered on November 8, 1937) and such voluntary accounting was intended as a final account of the estate.

2132

Except for the unknown claims of the firm of Crossman & Sielcken mentioned below, the only assets of the estate remaining or subsequently coming to the hands of the executor on that accounting were a refund of $32.80 from the clerk of the United States Supreme Court shown in Schedule A, one-half of which belonged to and was returned to Mr. McMaster, as shown by the first item in Schedule C; and the cash balance on hand on March 18, 1927, of $1,976.87, shown in Schedule A, which was paid to Mrs. Sielcken Schwarz in March, 1927, as shown in Schedule F.

2133

At that time, after deducting firm losses and the expenses of liquidating the business of the firm, the estate had realized as its share of the firm assets as of the death of the testator, the total sum of $4,059,684.01, as shown by the following tabulation:

Total amount realized from this asset up to March 18th, 1927, omitting income accruing after testator's death and after deducting firm debts and expenses of liquidation of firm	$4,125,094.00

2134 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

	Less commissions awarded to the executor on sums received and paid by it in the course of its liquidation of the firm (a duty imposed on the executor of Sielcken by the articles of co-partnership) consisting of			
	Total commissions awarded by			
2135	decrees of July 7, 1921	$34,055.48		
	of July 11, 1922	16,341.00		
	and February 9, 1925	24,835.23		
	and on voluntary accounting,	502.34	$75,734.05	
	Less commission on other assets of estate, including income	$ 9,564.91		
	and less over-computation of commissions in decree of February 9, 1925, later voluntarily returned by executor	759.15	10,324.06	65,409.99
2136	Estate's realization from this asset in March, 1927			$4,059,684.01

As against the assessed valuation of this asset on which the transfer taxes were paid, of $4,299,579.27

The realization by the estate from this asset up to May 1937 when it had, supposedly, been completely realized on, had been $4,059,684.01

Leaving an actual margin of *over-appraisement* of that asset (without taking into consideration the additional firm assets discovered in May 1927 and realized on in 1930 and 1931) of $ 239,825.26

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In May, 1927, subsequent to the rendition of the voluntary account and its approval by her, the sole residuary legatee, Clara Sielcken Schwarz, then the only person interested in the estate, other than this Executor, announced that she had discovered certain additional assets of the firm of Crossman & Sielcken, which had been until then wholly unknown to this executor and which were not shown on the firm books or in its files, consisting of two certain claims (which she asserted belonged to the former firm of Crossman & Sielcken, of whose assets the decedent's estate was then the sole owner) all evidences 2138
of which were in Germany, one against the Zentral Einkaufs Gesellschaft a German governmental corporation, and the other against the firm of Theodor Wille of Hamburg, Germany.

Without revealing to the Executor the exact nature of these claims, Mrs. Sielcken Schwarz then arranged with the Executor, which then held no funds available for that purpose, that she would prosecute these claims in its name (or otherwise as she might be advised), at her own cost and by such attorneys as she might employ for that purpose. 2139

Pursuant to this arrangement she, about November, 1927, brought a suit in the United States District Court for the Southern District of New York in the names of Thorleif S. B. Nielsen and John S. Sorenson, as surviving members of the said former firm of Crossman & Sielcken against said Zentral Einkaufs-Gesellschaft, and the Alien Property Custodian and the Treasurer of the United States (which two officials then held very large sums belonging to said Zentral Einkaufs-Gesellschaft), and on the 30th day of December, 1929, obtained and entered a decree of that Court in that suit awarding to the plaintiffs therein (Sorenson and Nielsen as surviving partners of Crossman & Sielcken) the sum of $716,160.37 against said Zentral Einkaufs-Gesellschaft, and directing that it be paid by the defendants Alien Property Custodian and Treasurer out of property of said Zentral Einkaufs-Gesellschaft in their hands.

2140 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Concurrently with that suit, she had instituted a proceeding before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesellschaft, in the joint names of Sorenson, Nielsen and this executor, upon the same claim that was set up in the District Court suit. This proceeding was withdrawn as part of the 1930 compromise described below.

About the same time that she began those proceedings
2141 she also instituted a proceeding before the Mixed Claims Commission—United States and Germany, in the joint names of said Nielsen, said Sorenson and this Executor (as the sole persons interested in the claim), against Germany and the firm of Theodor Wille of Hamburg, Germany, to recover several millions of dollars.

In the spring of 1930, the time to appeal from the said decree of the United States District Court had not expired, and there was most serious question whether it was not reversible for error as to the right of Sorenson and Nielsen to maintain the suit as plaintiffs; and the claims against Germany and the firm of Theodor Wille
2142 were being disputed; the said Clara Sielcken Schwarz, then, with the approval of this executor, on March 27, 1930, entered into a compromise of all these three claims, by which no appeal should be taken from the said decree of the United States District Court, and that judgment should be paid, and the claim before the Mixed Claims Commission—United States and Germany, against Germany and the Zentral Einkaufs Gesellschaft should be discontinued and dropped; and in addition an award should be made by the said Mixed Claims Commission on the claims before it against Germany and the firm of Theodor Wille, to the said claimants before it, of the sum of $558,827.85 and interest thereon at 5 per cent per annum from April 1, 1918. Such award was accordingly made by the Mixed Claims Commission—United States and Germany, to said Nielsen, said Sorenson and this executor on April 21, 1930.

By the terms of that compromise it was further provided that one-half of the sum recovered under that

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2143

District Court decree should be paid over by the plaintiffs in that suit to the Zentral Einkaufs Gesellschaft, and that $50,000 additional should be paid, out of their half of that recovery, by the plaintiffs, to the firm of Theodor Wille; and that an expense of $200 connected with the transfer from Washington to New York of the United States Treasury 3½ per cent notes received in part payment of that decree, should be shared $100 by the plaintiffs in that suit and $100 by the said Zentral Einkaufs Gesellschaft. 2144

A true and correct copy of such compromise agreement is hereto annexed marked Exhibit A and hereby made a part of this Schedule I.

In accordance with such compromise agreement, full payment of the sum awarded by said District Court decree and accruing interest thereon from the date of the decree was made in April, 1930, to Thorleif S. B. Nielsen and John S. Sorenson as surviving members of Crossman & Sielcken (the plaintiffs in that suit), as follows:

In United States Treasury 3½% Notes	$459,200.00	2145
In Cash	267,481.40	
Total		$726,681.40

This sum of $726,681.40 represented

principal of claim	$380,761.54
interest to date of decree	335,398.83
interest after decree	10,521.03
	$726,681.40

Of the $335,398.83 interest included in the judgment $278,889.94 accrued subsequent to the death of Hermann Sielcken on October 8th, 1917. The amount of the claim sustained by the court was thus at Sielcken's death $437,270.43, or 61½ per cent of the amount of the judgment.

Out of the sums so received, there was paid in accordance with such compromise:

2146 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

The expense of bringing the securities to New York		$ 200.00
To Zentral Einkaufs-Gesellschaft:		
In said United States Treasury Notes	$229,200.00	
Cash as owelty on the division made of the Treasury notes	400.00	
Half the $267,481.40 cash received (less $100. half the expenses of bringing the securities to New York	133,640.70	363,240.70
2147 To Theodor Wille		50,000.00
		$413,440.70

Leaving as the gross recovery by the firm from this claim as per such compromise:

Cash (deposited in the Three Name Account)	$ 83,240.70
United States Treasury 3½% notes (delivered to the Executor)	230,000.00

The Wille claim, pursuant to such compromise, resulted in an award to Sorenson, Nielsen and this Executor jointly, by the Mixed
2148 Claims Commission—United States and Germany, of date April 21st, 1930, of:

Principal as of April 1, 1918	$558,827.85
Interest from April 1, 1918 to January 1, 1928	272,524.27
Total	$831,352.12

Discounting the $558,827.85 of April 1, 1918, as of October 8th, 1917, we have a face value of the principal awarded as of the death of Sielcken of $543,274.71 (or 65⅓ per cent of the total award of $831,352.12) as the amount of the claim at the time of Sielcken's death.

All payments so far made on account of this award have been applied by the United States Treasurer upon this sum of $831,352.12 and none on subsequently accruing interest.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2149

From each such payment made by him the Treasurer of the United States deducted his statutory commission of one-half per cent before remitting.

The payments so made are as follows:

1930	Credit Against Award	Treasurer's Commission	Actual Payment Received
June 2	$468,713.25, less ½%	$2,343.56	$466,369.69
Nov. 12	$ 43,516.66, less ½%	$ 217.58	43,299.08
1931			
Apr. 28	$ 28,721.00, less ½%	$ 143.61	28,577.39
1932			
Jan. 8	$ 78,408.33, less ½%	$ 392.04	78,016.29
	(This last warrant for $78,408.33 was issued October 9th, 1931 but Mr. Sorenson refused to endorse it until January 8th, 1932.)		
	The balance of this award remains wholly unpaid. The statement from the United States Treasury Department of November 22nd, 1937 shows a balance of the original amount of the award still due of		$211,992.88
	plus interest therein accumulated to March 31, 1937, of none of which has been paid.		180,389.55

2150

2151

No later statement has been received from the Treasury Department and no further payment has been made on this award. Whether any further payments will ever be received is highly problematical. (See letter from the Treasury Department in Schedule B-1.)

All the cash so received in the settlement on both claims was deposited with the Irving Trust Company (as bank

2152 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

and not as executor) to the credit of said Sorenson and said Nielsen, but withdrawals therefrom could be made only by checks countersigned by the Executor. This Bank account is commonly called the "Three Name Account."

Sorenson and Nielsen's Executor (Nielsen died in September 1930) claimed to be each entitled to 12½ per cent of both these recoveries, as profits of the firm.

Four "Export Managers" of the former firm, T. Wei'ling, Budelmann, James W. Smith and Kirkpatrick,
2153 each claimed to be entitled pursuant to their contracts of employment by the firm, to ten per cent of the recovery on the claim against the Zentral Einkaufs Gesellschaft as profits of their department.

One Stewart also claimed to be entitled to 20 per cent of that recovery, as an attorney employed to prosecute a claim at one time asserted in the name of the firm *against Great Britain,* for its seizure of the cargoes the price of which cargoes was the subject of the recovery from the Zentral Einkaufs Gesellschaft, as the purchaser thereof, by the District Court suit and the compromise of that judgment.

2154 These various claims against these partnership assets —covering 85 per cent of the recovery on the Zentral Einkaufs Gesellschaft and 25 per cent of the award of the Mixed Claims Commission—were asserted in a series of suits begun by such various claimants, and involved the executor in heavy litigation, to defeat the claims so asserted against these partnership assets.

Sorenson also in 1930, in the same connection, advanced the claim that, as sole surviving member of the former firm, he was entitled to liquidate the assets of the firm, and, by steps attempted to be taken by him in that alleged capacity, he involved the executor in additional litigation. Sorenson also assumed to make federal income tax reports in the name of the firm in accordance with his own claims that these recoveries were profits of the firm, in which he was entitled to share. These reports led to the Federal income tax proceedings settled in 1934.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2155

The claims of Sorenson and Nielsen's Executor to these recoveries, and Sorenson's claim to be entitled as surviving partner to liquidate the affairs of Crossman & Sielcken, were all asserted in one action and were all finally determined invalid, after a long trial, by a judgment of the Supreme Court for New York County entered on November 11th, 1933, in the action brought by the Chase National Bank as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, Clara Sielcken-Schwarz and this executor (and others who were 2156 never served in the action or appeared therein).

The balance of the fund in the Three Name Account was thereupon transferred to the executor. In the interim some payments had been made out of the "Three Name Account" by the Executor (with the co-operation of Sorenson and Nielsen or his executor) on account of expenses incurred in the recovery by the firm of the claims against Wille and the Zentral Einkaufs Gesellschaft.

The claims of Stewart, and those of three of the four Export Managers on the fund, all asserted in independent suits brought by them respectively, were long since released, on settlements made with them by Mrs. Sielcken 2157 Schwarz, by payments to them by her aggregating $40,000. The claim of the fourth Export Manager (Weitling) went to trial and was dismissed and the present condition of that claim is shown in Schedule D above.

Additional litigation growing indirectly out of the 1930-1931 recoveries has been an action against one Rosenblum to vacate a judgment held to have been continuously obtained by him against said Sorenson *as surviving partner of Crossman & Sielcken,* which was accordingly vacated; and the pending action of Mildred Elfenbein as surviving partner of Maurice J. Elfenbein & Co. on substantially the same claim as that asserted by Rosenblum for $8,735 and interest, for services as accountants (actually employed by said Sorenson in 1930). She claims to be entitled to look to this estate for compensation therefor, which this executor

2158 *Exhibit A Annexed to Answering Affidavit of Belden Bacon*

disputes. That action is still pending as mentioned in Schedule D-3 hereof, subdivision (b).

A further important piece of litigation growing out of these recoveries was the claim of the United States Revenue authorities to impose an *income* tax on all these recoveries, amounting (with interest) to upwards of $180,000. This claim was finally compromised, on July 12th, 1924, after argument before the United States Board of Tax Appeals, by a stipulated award by that
2159 Board of $22,192.65, which was paid on July 12th, 1934, as shown in Schedule C of this account.

Heavy expenses were incurred in connection with these partnership recoveries both for the proceedings in which they were recovered in the United States District Court and before the Mixed Claims Commission, (which expenses were assumed by said Clara Sielcken Schwarz and have been paid to or for her out of said recoveries, as shown in Schedule F) and also for the expenses of defending such partnership recoveries against the claims of the estate of Nielsen, of Sorenson, of Stewart, of Weitling, of Budelman, of James W. Smith
2160 and of Kirkpatrick, and also in final settlement of the claims of said Stewart, said Budelman, said Kirkpatrick and said James W. Smith and in contesting these various claims and those of Rosenblum, Elfenbein and those of the United States Government for income taxes on such recoveries.

Part of those disbursements have been paid by Mrs. Sielcken Schwarz and so far as repaid to or for her out of the estate, are reported in this account in Schedule F as distributions to her as residuary legatee out of the estate. In addition, as this Executor is informed and believes, Mrs. Sielcken Schwarz has incurred some additional expenses in defending the Four Managers' suits since January 27, 1933, the amount of which expense is unknown to this Executor.

The items so paid her out of the estate for such expenses are set forth in Schedule F hereof, and include, as this Executor is informed and believes the following items there shown:

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2161

1930		
May 21	$ 61,657.94	
June 19	100,000.00	
June 27	364.50	
June 28	60.00	
Aug. 13	8.80	
Nov. 5	56,000.00	
Nov. 5	2,000.00	
Nov. 5	4,000.00	
Nov. 5	2,000.00	
Nov. 11	30,000.00	2162
Nov. 14	2.00	
1931		
Feb. 5	1,027.58	
Feb. 16	228.75	
Mar. 14	650.00	
Mar. 31	10,000.00	
Apr. 4	12,500.00	
Apr. 9	316.00	
Apr. 28	39,999.20	
May 2	821.26	
May 23	657.25	2163
June 22	162.50	
July 9	481.40	
July 24	495.75	
1932		
Jan. 8	30,279.47	
Jan. 8	3,000.00	
1933		
Apr. 27	10,000.00	
June 9	543.00	
Aug. 11	2,500.00	
Sept. 12	10,000.00	
Sept. 12	10,000.00	
Sept. 12	10,000.00	
Sept. 28	2,500.00	
Aggregating	$400,255.35	

2164 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

In addition to these disbursements by Mrs. Sielcken in these proceedings on firm account, the Executor has itself spent over $69,000 in making defense against the various actions above-mentioned based on the claims against these new firm assets, as partnership assets.

The proportionate part of these $469,000 disbursements for firm account, for the recovery and the protection of the firm assets, attributable to principal is something in excess of $290,000.

2165

The amount of principal as of the date of Sielcken's death so recovered on these new claims is, in round numbers,	$600,000.00
A similar proportion of the firm expenses in connection therewith is	$290,000.00
leaving	$310,000.00
From this should be deducted the amount of the excess of the original valuation of this asset above what was realized therefrom up to 1930	$239,825.26
2166 leaving	$ 70,174.74
Should the "Black Tom" claims be finally rejected, the further amount collectible on the unpaid *principal* of the award (taken as of Sielcken's death), would increase the recovery by only about	6,550.00
or a total of	$76,724.74

(Vide letter from the Treasury Department set forth in Schedule A-1.)

This executor is also advised and believes that, before any additional tax can be computed because of this increment, allowance must further be made for the additional unexpected expense to which the estate proper has been subjected owing to litigation over other than firm matters, begun since the summer of 1930 against the Executor, for which no allowance was made in the

original assessment. Such expenses have amounted to more than $230,000.

There is also the matter of further commissions to the executor on the 1930-1931 recoveries, computed in Schedule J hereof at $19,026.91.

Sixty per cent of these two items (being something less than the proportion of principal of the estate involved) amounts to over $150,000, as against the remaining amount of additional principal recovered by the estate ($76,724.74) on this asset above the valuation 2168
originally placed thereon.

Recomputation of the tax would, accordingly, result in no increase above the amount already assessed and paid.

If any additional tax could be assessed it would be against the interest of Mrs. Sielcken Schwarz at the rate of 4% on the increased amount of such assessment.

Moreover, this executor is advised and believes that the State is concluded by the valuation of this asset made by the orders of 1919 and 1923, fixing the value of this asset and imposing tax thereon, and can no more ask for revaluation of this separately valued asset, of 2169
the interest of the estate in the firm, because something more is finally realized therefrom than was originally estimated, than could this executor have reopened the assessment in 1926 because the amount realized from that asset was $239,825.26 less than it had been assessed at by the decrees of 1919 and 1923.

The Executor, therefore, will dispute any claim for any additional assessment of transfer tax on this estate, on account of these recoveries.

2170 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Schedule I.

EXHIBIT 1.

BARNES, AVERY & WHITING
100 Broadway,
New York

2171 BRAINARD AVERY
EARL B. BARNES
JAY E. WHITING
GEO. O. CASTELL

March 27, 1930.

Arthur Garfield Hays, Esq.,
43 Exchange Place,
New York City.

Dear Sir:

2172 *Claims of U. S. A. on behalf of Crossman & Sielcken in Liquidation and Irving Trust Company against Germany and Z. E. G.*

Z. E. G. against Executors of Hermann Sielcken deceased, and Clara Sielcken Schwarz as residuary legatee of estate of Hermann Sielcken.

Theodor Wille against Crossman & Sielcken in Liquidation, and Clara Sielcken Schwarz.

Referring to our recent conversation with respect to the settlement of the above mentioned claims, we confirm to you that the following is our understanding of the terms of settlement upon which we have agreed.

1. The money and bonds received by Crossman & Sielcken in Liquidation from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree for $716,160.37 of the United States

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2173

District Court for the southern district of New York, dated December 30, 1929, are to be forthwith deposited in a bank in this city, to be selected by you and ourselves, in the joint names of Brainard Avery and Arthur Garfield Hayes and to remain there pending consummation of the settlement herein described.

We are informed by the Alien Property Custodian that the fund to the credit of this trustee amounted, on March 22, 1930, to the sum of $786,056.86, made up as follows: 2174

Government bonds	$475,200.00
Cash	133,279.83
Income interest	177,577.03
Total	$786,056.86

We are further informed that there are no claims filed against the fund except the claim represented by said decree and one claim for $200.

2. The claim of Z. E. G. against the executors of Hermann Sielcken deceased and Clara Sielcken Schwarz as residuary legatee of his estate, arising out of the indemnity agreement dated August 31, 1918, is to be settled by payment to you, as attorney for Z. E. G., of one-half of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the principal of said decree with interest thereon accumulated from December 30, 1929 to the date of payment, together with one-half of any interest that may accumulate or be paid thereon during the time said bonds and/or moneys are on deposit in said bank in the joint names of Brainard Avery and Arthur Garfield Hays as hereinbefore provided. 2175

3. You are to produce and deliver to us four general releases duly executed by Z. E. G. and running to the following persons:

(a) To Estate of George Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as ex-

2176 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

ecutors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

(b) To Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson, as surviving and liquidating
2177 partner of the firm of Crossman & Sielcken.

4. We are to procure and deliver to you the following releases, duly executed by the parties signing the same and running to Z. E. G.:

(a) A general release from Clara Sielcken Schwarz as sole beneficiary of the residuary estate of Hermann Sielcken deceased.

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

2178 (c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

5. The claim of Theodor Wille against Crossman & Sielcken in Liquidation and against Clara Sielcken Schwarz is to be settled by payment to you or your nominee for account of Theodor Wille, of the sum $50,000 in cash for our clients share of the moneys and/or bonds received from the Alien Property Custodian and/or Treasurer of the United States, in payment of the decree dated December 30, 1929, hereinbefore referred to.

6. In connection with the settlement of the Wille claim, you are to procure and deliver to us four general releases

 2179

duly executed by the firm of Theodor Wille and running to the following persons:

(a) To Estate of George Georgius, Estate of Gustav Diederichsen, Carl Isenberg and Richard Isenberg, as executors under the codicil of the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

(b) To Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased. 2180

(c) To Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken deceased.

(d) To John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken.

7. In connection with the settlement of the Wille claim, we are to procure and deliver to you the following releases, duly executed by the parties signing the same, and running to Theodor Wille:

(a) A general release from Clara Sielcken Schwarz, individually and as sole beneficiary of the residuary estate of Hermann Sielcken, deceased. 2181

(b) A general release from Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken, deceased. Said release shall also specifically release Theodor Wille of and from any and all claims of the Columbia Trust Company (now Irving Trust Company) more particularly set forth in the memorial or memorials for claim now pending before the Mixed Claims Commission, List No. 207, Docket No. 8304.

(c) A general release from John S. Sorenson as surviving and liquidating partner of the firm of Crossman & Sielcken. Said release shall also specifically release Theodor Wille of and from any and all claims of John S. Sorenson more particularly set forth in the memorial

2182 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

or memorials for claim now pending before the Mixed Claims Commission, List No. 6207, Docket No. 8304.

(d) A general release from Carl Isenberg and Richard Isenberg as executors of the codicil to the Last Will and Testament of Hermann Sielcken, deceased, dated February 18, 1917.

8. The payments to be made, and the exchange of releases hereinbefore provided for are conditioned upon
2183 an award being entered in favor of the United States of America on behalf of Columbia Trust Company (now Irving Trust Company) as executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of Crossman & Sielcken, against Germany and the firm of Theodor Wille, for the sum of $558,827, with interest thereon at the rate of 5% from the 1st day of April, 1918, to the date of payment, in the proceedings now pending before the Mixed Claims Commission United States and Germany, contained in List No. 6207, Docket No. 8304.

2184 If the foregoing is in accord with your understanding of the terms of settlement above described, kindly indicate the same.

Very truly yours,

(Signed) EARL B. BARNES
BRAINARD AVERY

The foregoing is in accord with my understanding of the terms of settlement hereinabove described.

ARTHUR GARFIELD HAYS
Zentral Einkaufsgesellschaft
By Arthur Garfield Hays,
Atty. in fact.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2185

New York, 100 Broadway,
March 27, 1930.

To Messrs. Brainard Avery and Earl B. Barnes.

You are hereby authorized and directed to sign and deliver the foregoing letter.

APPROVED

IRVING TRUST COMPANY,
By ORRIN R. JUDD,
Vice President

CLARA SIELCKEN SCHWARZ
By Alex Wendroth Sielcken
Atty. in Fact. 2186

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

2187

Schedule J.

COMPUTATION OF EXECUTOR'S COMMISSIONS.

Items on which Commissions Computed

Receipts

Schedule A

Schedule A	$ 60,747.52	
Less items on which commissions already awarded	60,743.02	4.50
Schedule A-1	*1,321,885.58*	
Less *Schedule B-1*	*392,382.43*	929,503.15
Schedule A-2		22,056.66
Total		$951,564.31

2188 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

Disbursements

Schedule C	$ 229,867.35	
Less items on which commissions already awarded $32.80, $17,967 and $759.15 and $8.00	18,766.95	$211,100.40
2189 *Schedule F*	$ 782,004.39	
Less items on which commission already awarded, $1,976.87, $39,999.20	41,976.07	740,028.32
		$951,128.72

Leaving in the hands of the Executor Cash $435.59.

Uncollected Amount shown in Schedule
2190 B-1 and the refunding bonds shown in Schedule A-3.

On the above items of receipts and disbursements commissions are calculated as follows:

On Receipts	
On $951,564.31 at 1%	$ 9,515.64
On Disbursements	
On $951,128.72 at 1%	9,511.28
	$19,026.92

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2191

Schedule K.

OTHER FACTS AFFECTING THE ADMINISTRATION OF THE SAID ESTATE.

By the judgment in the Supreme Court action of The Chase National Bank vs. Sorenson *et al*, entered November 11, 1933, in the Supreme Court for New York County, it was determined that the executor of Hermann Sielcken had the right and duty of liquidating the affairs of 2192
the copartnership of Crossman & Sielcken.

By the same judgment, the Irving Trust Company as such executor was required to render an account of its liquidation of the partnership since the accounting as of February 28, 1919, approved by the decree of this court of July 7, 1921. In the account so required by the Supreme Court, the executor embodied its accountings rendered before this court, approved by its decree of July 11, 1922 and by its decree of February 9, 1925, and the voluntary extra judicial accounting of this executor to the residuary legatee as of March 18, 1927, of which extra judicial account a copy is hereto annexed, marked 2193
Exhibit A and hereby made a part of this schedule.

That accounting before the Supreme Court showed that the executor as liquidator of the partnership had turned over to itself as executor of the estate the sums of $300,357.72
in cash and 230,000.00
in 3½% Treasury Notes of the United States and authorized it to turn over to itself as executor the further sum of 110,098.06
and the uncollected balance of the award of the Mixed Claims Commission, shown in Schedules A-1 and B-1.

Owing to the need of ascertaining the Executor's commissions and whether the estate is subject to further transfer tax on account of the recoveries of 1930 and 1931, the relevant items of that account have been in-

2194 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

cluded in the schedules on this accounting, being all the items including the starred items in Schedule A-1 and in Schedule A-2 of this account, with which the Executor here charges itself, and as against these $334,360.27 of the uncollected balance of the award set forth in Schedule B-1 and the two starred items in Schedule C, of $9,695.31 and .02, and the starred items in Schedule F, amounting to *$292,872.71*, all of which appeared in said partnership accounting.

2195 Deducting the one set of figures from the other the result shown by these items is that this Executor here charges itself, net, with the exact sums shown as turned over to the Executor in the partnership accounting, to wit, the $300,357.72 in cash, the $230,000.00 in Treasury Notes, the $110,098.06, and the unpaid balance of the award.

In addition to all the litigation arising out of the firm collections of 1930 and 1931, as claims against the firm assets, and the claims of Rosenblum and Elfenbein, and
2196 of the United States for income taxes, all of which are referred to in Schedule I hereof, this executor has been subjected to three proceedings instituted by the residuary legatee and by her son Alexander Wendroth Sielcken.

The suit attempted to be instituted by said Alexander W. Sielcken was in the Chancery Court of New Jersey, and in that suit it was held that the Irving Trust Company in its capacity as executor of Hermann Sielcken was not subject to the jurisdiction of the New Jersey courts and the service made on the executor of process in that suit was accordingly vacated and set aside. The executor was represented in that proceeding by Mr. Vanderbilt of Newark, New Jersey, and it is for those services in vacating and setting aside the service there made that Mr. Vanderbilt was paid the amount shown in Schedule C.

The residuary legatee, Mrs. Clara Sielcken Schwarz, in 1932, instituted an action in the Court of Common Pleas

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2197

for Lucas County, Ohio (Toledo) against the Woolson Spice Company and certain of its officers and stockholders and the executors of a deceased stockholder, and this executor, asserting fraud in the sale of the shares of the Woolson Spice stock by this executor in 1918, which sale had been confirmed by the decree of this court of July 7, 1921.

This executor claimed that it was not subject to the jurisdiction of the Ohio Courts as executor and moved to vacate the service of the summons on it in that case, 2198
which motion was denied. The executor thereupon answered at length, denying all allegations of fraud and negligence on its part and asserting the confirmation of that sale by the decree of this Court of July 7, 1921.

In that case most elaborate proofs have been taken, first by the plaintiff in Ohio, by way of examination before trial of the other defendants, wherein approximately 600 pages of testimony were taken, of which this executor needed copies, and over 3000 pages were taken by the defendants in that action by way of depositions in New York, in the taking of which depositions this executor took part.

2199

That action is now apparently about to be abandoned. By her petition in that action the residuary legatee claimed to have been damaged in very large sums, running, as her counsel claimed, to fully $4,000,000.

In addition, in April, 1932, the residuary legatee instituted a proceeding in this court to vacate the decree of this court of July 7, 1921.

In late November 1933 she asked leave to amend and supplement this petition, which leave was granted on terms, and by her amended petition she sought to vacate and set aside the decrees of this court of July 7, 1921, July 11, 1922 and February 9, 1925, approving the first three accountings of this executor.

In that proceeding, she asserted a very large number of claims of fraud on the part of the executor, which were tried at great length before Referees Lewis and Seligsberg, appointed to take testimony and report to

this Court, Mr. Seligsberg having been appointed in place of Mr. Lewis who died while the proceeding was pending.

The Referee reported in favor of opening such decrees to a certain extent, but on a hearing before this Court in December 1936 the petition was dismissed on its merits by this court, by decree of May 15, 1937. An appeal taken from that decree by Mrs. Sielcken Schwarz has been dismissed.

2201 By that proceeding, the residuary legatee sought to surcharge this executor with sums aggregating about $4,000,000 in addition to the sums claimed by her in the said Toledo action.

In all this litigation since early November 1931, this executor was primarily represented by Mr. Selden Bacon of the firm of Duer, Strong & Whitehead and in a supervisory capacity by Mr. Leonard B. Smith, who had been counsel for the executor since 1919, and for the purposes of the final argument before this Court by Hon. Nathan L. Miller of New York; and it was also represented in the Toledo suit by local counsel in Toledo, Ohio, Messrs. Williams, Eversman & Morgan. The payments to these
2202 attorneys and the amount of their unpaid claims appear in Schedules C and D-1 of this Account.

All this litigation has so far been conducted by this executor with success in all the matters involved, the one recovery against the executor in all the litigation being the award of $22,192.65 for Federal Income taxes, as against $182,000 claimed by the Government.

The preparation of the present account has been a matter requiring the attention of counsel owing to the complexities arising from the separate accountings heretofore rendered of the estate and of the firm and the necessity of showing the lack of basis for any further estate tax by the State of New York on account of the firm recoveries of 1930 and 1931.

None of the personal property of the decedent now being accounted for or listed as an asset of the estate was, at the date of decedent's death, pledged as collateral

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2203

to any unpaid obligation of the decedent, save only as claims against the partnership were collectible primarily out of the partnership assets.

The decedent left no real property in the United States, but died seized, as this executor is informed and believes, of landed estate in or near the city of Baden-Baden in Germany known as Mariahalden. Such real estate, in Germany did not come to or under the jurisdiction of this executor in any way. This executor is informed and believes that said Mariahalden was not subject to any liens or mortgages at the time of the testator's death and that at that time its value was $362,413.34. 2204

With regard to the claims against Great Britain referred to in Subdivision 1 of Schedule 6 of Exhibit 1 of this Schedule K; these claims were on account of the same cargoes for which recovery was subsequently had from the Zentral Einkaufs Gesellschaft, in 1930, as set forth in Schedule A-1 and I. No recovery was ever obtained against Great Britain nor could be, after that recovery from the Zentral Einkaufs Gesellschaft, and the claims against Great Britain were abandoned as unsustainable.

2205

Schedule K.

EXHIBIT 1.

ACCOUNT.

American Exchange Irving Trust Company (formerly successively named Columbia-Knickerbocker Trust Company, Columbia Trust Company, Irving Bank-Columbia Trust Company, and Irving Bank and Trust Company), as Executor of the last Will and Testament of Hermann Sielcken, deceased, renders the following account of its proceedings as such Executor since the 14th day of January, 1925.

2206 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

On the 26th day of January, 1918, Letters Testamentary on said Will were duly issued to this accountant out of the Surrogate's Court of the County of New York.

On the 24th day of June, 1919, the Executor filed in the Surrogate's Court of the County of New York, an account extending from the date of its appointment to the 28th day of February, 1919. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 7th, 1921, and filed in the office of the
2207 Clerk of said Court on the 8th day of July, 1921.

On the 28th day of March, 1922, the Executor filed in said Surrogate's Court a second account extending from the 28th day of February, 1919, the date of its previous accounting, to and including the 31st day of December, 1921. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated July 11th, 1922, and filed in the office of the Clerk of said Court on the 13th day of July, 1922.

On the 30th day of January, 1925, the Executor filed in said Surrogate's Court a third account extending from the 31st day of December, 1921, the date of its last previ-
2208 ous accounting, to and including the 14th day of January, 1925. Said account was judicially settled and allowed by a decree of said Surrogate's Court, dated and filed in the office of the Clerk of said Court on February 9th, 1925.

SCHEDULE 1, hereto annexed, contains a statement of all the property and assets constituting the estate of said decedent on the 14th day of January, 1925, the date of the last accounting.

SCHEDULE 2, hereto annexed, contains a statement of all cash received by the Executor from the disposition of the assets, and all other sources, from January 14th, 1925, to the date of this accounting.

SCHEDULE 3, hereto annexed, contains a statement of all cash paid for expenses of administration since January 14th, 1925, the date of the last accounting.

Exhibit A Annexed to Answering Affidavit of Selden Bacon

2209

SCHEDULE 4, hereto annexed, contains a statement of all property transferred, and payments made, to legatees under the Will.

SCHEDULE 5, hereto annexed, contains a statement of the items constituting the assets of the estate on the date of this accounting.

SCHEDULE 6, hereto annexed, contains a statement of all other facts affecting the administration of the estate, the rights of the Executor and those of others interested therein.

2210

SUMMARY STATEMENT.

The Executor charges itself as follows:		
With amount of Schedule 1		$304,753.67
With amount of Schedule 2		138,411.76
		$443,165.43
The Executor credits itself as follows:		
With amount of Schedule 3	$ 1,270.12	
With amount of Schedule 4	409,918.44	441,188.56
Leaving a balance of		$ 1,976.87

2211

to be paid over to the residuary legatee, Clara Sielcken Schwarz.

The said schedules, which are severally signed by the Executor, are hereby made part of this account.

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

2212 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 1."

Contains a statement of all the property and assets constituting the estate of the decedent on the 14th day of January, 1925, the date of the last accounting.

Warburg & Goldschmidt, balance due on settlement	$ 850.00
$100,000 N. Y. City 3 1/2 Cap. Stock due 1940 at 78 1/8 net	78,125.00
2213 $25,000 State of Illinois 4 1/4% due 1938 at 101.8339	25,459.73
$25,000 State of Minnesota 4s 1943 at 99 net	24,750.00
$15,000 City of San Francisco 4 1/2s due 1943 at 101.1972	15,179.58
$15,000 State of Kansas 4 1/2s due 1939 at 104.1436	15,621.54
$15,000 City of Milwaukee School 4 1/2s due 1931 at 102.1845 net	15,327.68
$10,000 City of Minneapolis 4 1/2s due 1936 at 102.9020	10,290.21
$25,000 City of Cincinnati, 4 1/2s due 1936	
2214 at 103.2642	25,816.05
Accrued interest paid on purchase of above bonds and not received prior to date of last accounting	223.89
Cash	93,109.99
	$304,753.67

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2215

"Schedule 2."

Contains a statement of all cash received by the Executor from the disposition of the assets, and all other sources, from January 14th, 1925, to the date of this accounting.

1925				
Jan. 22	Received interest on deposits, Crossman and Sielcken, in liquidation		$ 4.74	2216
Jan. 24	Received from Treas. Dept. U. S. for refund of Federal Estate Tax	$113,294.34		
	Int. on $94,423.03 refund from 2/26/21 to 12/20/24	19,331.72		
	Int. on 2,105.28 from 6/10/21 to 12/20/24	445.74		
	Int. on 26,766.03 from 1/11/22 to 12/20/24	4,725.49		
	Total		137,797.29	2217
Mar. 2	Received interest on deposits, Crossman and Sielcken, in liquidation		3.07	
May 28	Interest on deposits		462.20	
Nov. 28	Interest on deposits		51.52	
1926				
May 28	Interest on deposits		43.74	
Nov. 29	Interest on deposits		30.91	
1927				
Mar. 18	Interest on deposits		18.29	
	Total		$138,411.76	

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY, Executor,
By H. MAJOR,
Assistant Secretary.

2218 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 3."

Contains a statement of all cash paid for expenses of administration since January 14th, 1925, the date of the last accounting.

1925				
Jan.	14	Paid Pioneer Warehouse Co., storage of books and papers		$ 35.83
Feb.	5	Paid additional Federal Income Tax on amended Return for the year 1922, $2518.23, with interest as follows:		
2219		1st quarterly payment due 3/15/23....	$629.56	
		Int. at 6% from 3/15/23—2/5/25....	71.61	
		2nd quarterly payment due 6/15/23....	629.56	
		Int. at 6% from 6/15/23—2/5/25....	62.09	
		3rd quarterly payment due 9/15/23....	629.56	
		Int. at 6% from 9/15/23—2/5/25....	52.57	
		4th quarterly payment due 12/15/23..	629.55	
		Int. at 6% from 12/15/23—2/5/25....	43.15	
				$ 2,747.65
Feb.	14	Paid Irving Bank-Columbia Trust Company,		
2220		Executor's commissions pursuant to decree of the Surrogate's Court dated February 9th, 1925, settling the Executor's account to January 14th, 1925		24,835.23
Feb.	25	Paid Pioneer Storage Warehouse Co., storage of books and papers		35.83
Mar.	16	Paid Collector of Internal Revenue, Second District of New York, First Quarterly payment of 1924 Income Tax		55.63
Apr.	14	Paid State Tax Commission, New York State Income Tax for 1924		62.66
June	12	Paid Colelctor of Internal Revenue, Second Distriet of New York, balance of 1924 Income Tax		166.88
1926				
Mar.	5	Paid Irving Bank-Columbia Trust Company, Executor's commissions for the year 1925, 2% on $25,019.74		500.39
Mar.	15	Paid Collector of Internal Revenue, Second District of New York, Federal Income Tax for the year 1925, in full		1,092.22

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2221

Apr. 2	Paid State Tax Commission, additional tax on 1922 Income, as per Notice of Assessment		263.55
Apr. 14	Paid State Tax Commission, New York State Income Tax for the year 1925		240.75
Aug. 21	Paid Hans. H. A. Meyn, for legal services, opinion and affidavit as to German law		150.00
1927 Jan. 22	Paid Leonard B. Smith for disbursements as follows:		
	Cost of Printing Brief on application for Certiorari to the U. S. Supreme Court	$ 53.40	2222
	Judgment for Printing in Court of Claims	9.70	
		$ 63.10	
	Less amount paid by McMaster & Thurber	31.55	31.55
1927 Jan. 25	Paid Leonard B. Smith, Docket fee in the U. S. Supreme Court	$ 25.00	
	Additional Deposit	75.00	2223
		$100.00	
	½ paid by Mr. McMaster	50.00	50.00
Mar. 18.	Paid American Exchange Irving Trust Company, commissions as Executor from January 1st, 1926, to date		1.95
Mar. 18	Paid Leonard B. Smith, legal services and disbursements in the administration of the estate from January 14th, 1925, to date		1,000.00
	Total		$31,270.12

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,

By H. MAJOR,
Assistant Secretary.

2224 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 4."

Contains a statement of all property transferred, and payments made, to legatees under the Will.

1925			
Jan. 21	Paid to Clara Sielcken Schwarz, on account of her residuary legacy		$ 50,000.00
Feb. 20	Paid to Clara Sielcken Schwarz, on account of her residuary legacy, balance of the cash payment directed by decree of the Surrogate's Court on February 9th, 1925, as follows:		
2225	Amount of payment directed by the decree	$68,274.76	
	Less payment on account on January 21, 1925	50,000.00	18,274.76
Feb. 20	Assigned to Clara Sielcken Schwarz, uncollected demand against Warburg & Goldschmidt, pursuant to decree of the Surrogate's Court dated February 9th, 1925		850.00
2226 Feb. 20	Transferred to Clara Sielcken Schwarz, the following securities pursuant to the decree of the Surrogate's Court of February 9th, 1925, at the following valuations fixed in said decree:		
	$100,000 N. Y. City 3½ Capital Stock due 1940 at 78⅛ net		78,125.00
	$25,000 State of Illinois 4½% due 1938 at 101.8339		25,459.73
	$25,000 State of Minnesota 4s 1943 at 99 net		24,750.00
	$15,000 City of San Francisco 4½s due 1943 at 101.1972		15,179.58
	$15,000 State of Kansas 4½s due 1939 at 104.1436		15,621.54
	$15,000 City of Milwaukee School 4½s due 1931 at 102.1845 net		15,327.68

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2227

	$10,000 City of Minneapolis 4½s due 1936 at 102.9020	10,290.21
	$25,000 City of Cincinnati 4½s due 1936 at 103.2642	25,816.05
	Accrued interest paid on purchase of above bonds and not received prior to date of last accounting	223.89
Feb. 20	Paid to Clara Sielcken Schwarz, on account of her residuary legacy	130,000.00
	Total	$409,918.44

2228

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. MAJOR,
Assistant Secretary.

"Schedule 5."

2229

Contains a statement of the items constituting the assets of the estate on the date of this accounting.

1927			
Mar. 18	Cash in hands of Executor	$	1,976.87

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. MAJOR,
Assistant Secretary.

2230 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

"Schedule 6."

Contains a statement of all other facts affecting the administration of said estate, the rights of the Executor and those of others interested therein.

1. In addition to the assets set forth in this account and previous accounts, the Estate of said decedent has a possibility of recovering from Great Britain, through diplomatic channels or otherwise, the proceeds of certain
2231 cargoes of merchandise in which the decedent had an interest, which cargoes were seized by the British Navy, condemned by a British Prize Court, and sold during the European War. The Executor assigned these claims to the residuary legatee, Mrs. Clara Sielcken Schwarz, by assignment executed and delivered 1925. The Executor had employed as attorney for the prosecution of these claims, Frank H. Stewart, Esq., of #6 Beacon Street, Boston, Massachusetts. The Executor had made a contract with Mr. Stewart for the prosecution of the claims upon a contingent fee; all the papers in connection with said claims were in the possession of Mr. Stewart.

2232

2. On January 24th, 1925, the Executor received from the Treasury Department, a refund on account of the Estate Tax of $113,294.34, with interest thereon amounting to $24,502.95, total $137,797.29, as set forth in "Schedule 2" hereof. The said refund was made up of three classes of items, viz:

(1) Administration expenses incurred by the Executor subsequent to October 30th, 1920, the date of the assessment of the Estate Tax, for which expenses no allowance was made in said assessment.

(2) Claims against the Estate paid by the Executor subsequent to October 30th, 1920.

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2233

(3) Losses sustained in liquidating doubtful assets of the Estate, for which losses no allowance had been made in the assessment.

Many of the items in class (1) (Administration Expenses), had already been claimed as deductions from income, for the purpose of the Federal Income Tax during the years in which they were respectively incurred, and it was required by the Government as a condition of the readjustment of the Estate Tax, that Amended Income Tax Returns should be filed for the 2234
years 1921 and 1922, eliminating these deductions. Such Amended Returns were accordingly filed, resulting in an additional tax for 1922, amounting with interest, to $2,747.65, which the Executor paid on February 5th, 1925, as shown in "Schedule 3" hereof.

3. On March 31, 1925, the Executor made a motion in the Surrogate's Court, to modify the orders assessing the Transfer Tax upon the Estate, and thus to recover about $18,000 in taxes, on the ground that the amount of the Federal Estate Tax should have been deducted from the gross estate for the purpose of assessing the Transfer Tax. This motion was made in 2235
order to arrest the running of the statutory limitation of time for such a motion. It was held in abeyance until the decision on April 14th, 1925, of the case of Stebbins vs. Riley by the United States Supreme Court, which decision destroyed the basis for the Executor's claim, and the motion was thereupon withdrawn.

4. About January 28th, 1925, the Executor filed a claim for refund of Federal Estate Tax amounting to about $51,000 and interest, upon the ground that under the provisions of the Revenue Act of 1916, the Federal Estate Tax itself should have been deducted from the gross estate in computing the net estate subject to tax. This claim was rejected, and the Executor thereupon brought an action upon it in the Court of Claims of the United States. This action was argued and ex-

2236 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

tensive briefs were submitted by both sides, and the action was decided by the Court of Claims against the Estate, on November 8th, 1926. The Executor then made an application to the Supreme Court of the United States, for a writ of certiorari to review the decision, but this application was denied, and the action was thus finally terminated. However, a number of actions in other estates are now pending in the United States Courts in several different Circuits, and each
2237 of these actions will be appealed to the Circuit Court of Appeals. In case one of the Circuit Court of Appeals should decide in favor of the Estate, a conflict of decisions would be presented, which the United States Supreme Court would undoubtedly review by a writ of certiorari, and thus the legal question at issue might ultimately be decided against the government. Counsel for the Executor are trying to arrange matters with the Treasury Department, by stipulation or otherwise, in such a way that in the event of the ultimate determination of the question of law against the government, the Estate may obtain the benefit of such decision and receive the refund, notwithstanding the adverse termina-
2238 tion of the Executor's own action. This possibility of ultimate recovery of the aforesaid refund is the only outstanding claim existing in favor of the Estate against anyone, to the knowledge of the Executor.

5. During the period covered by the account, several questions arose in regard to the payment of additional State and Federal Income Taxes, which payments appear in the account, but it is believed that these matters have all been now finally settled. The reopening of the Federal Income Tax Returns for 1920 and previous years, is now barred by lapse of time, and the subsequent Returns have been amended, so that it is believed there is no prospect of any further claim by the government. The Executor did not enter into any agreement with the Treasury Department fixing the

Exhibit A Annexed to Answering Affidavit of Selden Bacon 2239

amount of the Income Taxes, as the Executor was advised by counsel that this was inadvisable.

Dated, New York, March 18th, 1927.

AMERICAN EXCHANGE IRVING TRUST COMPANY,
Executor,
By H. Major,
Assistant Secretary.

State of New York,
County of New York, ss: 2240

Henry Major, being duly sworn, says:

I am an officer, to wit: Assistant Secretary of American Exchange Irving Trust Company, the Executor of the last Will and Testament of Hermann Sielcken, deceased, and as such officer of and in behalf of the said Executor I have had charge and management of the administration of the estate of said decedent and am familiar with all the facts and circumstances involved in said administration. The charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by said Executors to creditors, legatees and for necessary expenses are correct. The Executor is charged 2241
therein with all interest for moneys received by it and embraced in said account for which it is legally accountable; the moneys stated in said account as collected were all that were collectible according to the best of its knowledge, information and belief; the allowances in said account for decrease in value of any assets and charges therein, for the increase in such value are correctly made, and I do not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in said estate or fund, and said account contains to the best of my knowledge and belief a full and true statement of all receipts and disbursements on account of said estate or fund and of all money and other property belonging to said estate or fund which have come into its hands or which have been received by any other person for it or by it or by order or authority for its use; and I do not know of any error or omission in

2242 *Exhibit A Annexed to Answering Affidavit of Selden Bacon*

the account to the prejudice of any creditor of or person interested in said estate or fund.

HENRY MAJOR.

Sworn to before me this
18th day of March, 1927.
G. E. Osborn,
Notary Public,
Queens County No. 1298.
Cert. filed in N. Y. Co. No. 102. Reg. No. 8084.
2243 Cert. filed in Bronx Co. No. 37, Reg. No. 8041.
Term expires March 30, 1928.
(Notarial Seal)

December 1, 1937.

IRVING TRUST COMPANY,
As Executor of Hermann Sielcken, Deceased,
By JOHN F. McILWAIN,
Assistant Secretary.

Affidavit of Accounting Party.

2244 State of New York,
County of New York, ss:

John F. McIlwain, being duly sworn, says: that he resides at Scarsdale in the County of Westchester, State of New York; that he is Assistant Secretary of the Irving Trust Company and that he has been, since May, 1933, in primary charge for it of the estate of Hermann Sielcken, deceased, of which said Irving Trust Company is and since January 26th, 1918, has been executor; that prior to May, 1933, Mr. Orin R. Judd (who is no longer connected with the Irving Trust Company), who was a vice president of said Irving Trust Company had primary charge of said estate for said Trust Company from 1925 until May, 1933, when deponent succeeded him; and deponent has familiarized himself with the details of such administration since March 18th, 1927, the date of the last prior accounting of such estate up to the time in May, 1933, when he

Exhibit A Annexed to Answering Affidavit of Selden Bacon

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was placed in primary charge thereof that the foregoing schedule of assets of the estate reported by this executor are true and complete and include all money and property of any kind, and all increment thereon, which has come into the Executor's hands or has been received on its account by any other person, and include all indebtedness due by said deceased, whether discharged by his will or not, save only items discharged prior to March 18th, 1927, shown by said executor's prior accountings herein; that the moneys stated in

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said account as collected by this executor were all that could be collected; that all claims of credit for losses or decreases of value of assets are correctly reported; that the reported payments by it out of estate assets for funeral and administration expenses were actually made, and made in the amounts scheduled; that the reported payments to creditors, to legatees and to distributees were actually made at the dates and in the amounts scheduled; that no payments have been made by this executor on its own claims against the estate, except after prior approval and allowance by the Surrogate; that all receipts and disbursements are correctly and fully reported and scheduled; that affiant does not know

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of any error in the account or in any schedule thereof nor does he know of any matter or thing relating to the estate of deceased omitted therefrom to the prejudice of the rights of any creditor or of any person interested in the estate; and that the schedule of commissions submitted by the executor has been computed in conformity to the statute regulating commissions and the Rules of the Surrogate's Court, New York County, applicable thereto.

JOHN F. McILWAIN.

Sworn to before me this
11th day of December, 1937.
William G. Phillips,
Notary Public,
Nassau Co., N. Y., No. 992.
Certificate filed in N. Y. Co. No. 148.
N. Y. County Register's No. 8-P-92.
My Commission expires March 30, 1938.
(Seal)

2248 **Exhibit B Annexed to Answering Affidavit of Selden Bacon.**

BEFORE THE MIXED CLAIMS COMMISSION

UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922,

BETWEEN THE UNITED STATES AND GERMANY

2249 United States of America on behalf of COLUMBIA TRUST COMPANY (now the American Exchange Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken, vs. GERMANY, and the firm of THEODOR WILLE, impleaded. 2250	List No. 6207 Docket No. 8304

MEMORIAL FOR CLAIM

The claimants, Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, citizens of the United States, respectfully show to this Commission:

(1) That Hermann Sielcken was on all pertinent dates herein, and until the time of his death, on or about October 8, 1917, a citizen of the United States, residing in the United States, although temporarily residing in Germany at the time of his death (Exhibits 1, 2 and 3); that Clara Sielcken (now Clara Sielcken Schwarz), the widow and sole beneficiary of the residuary estate of the said Hermann Sielcken, deceased (Exhibit 4), is and was on all pertinent dates herein a citizen of the United

Exhibit B Annexed to Answering Affidavit of Selden Bacon

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States (Exhibits 1 and 2), residing in the United States, although in Germany at the outbreak of the War, and returned to the United States in 1919 (Exhibit 2); that John S. Sorenson and Thorleif S. B. Nielsen are citizens of the United States and, on all pertinent dates herein, resided in the United States (Exhibits 3 and 5); that the Columbia Trust Company (now the American Exchange Irving Trust Company) is and was on all pertinent dates herein a corporation duly organized and existing under the laws of the State of New York, having its principal place of business in the City of New York, State of New York (Exhibit 6, Annex A).

2252

(2) That the said Hermann Sielcken, deceased, left a Last Will and Testament wherein he named the Columbia-Knickerbocker Trust Company as Executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken, hereinafter mentioned (Exhibit 4); that the said Columbia Trust Company is the executor named as "Columbia-Knickerbocker Trust Company" in the said Last Will and Testament (Exhibit 6, Annex A)..

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(3) That said Last Will and Testament of Hermann Sielcken was duly admitted to probate by the Surrogate's Court of New York County in the City of New York on or about the 25th day of January, 1918; and that the said Columbia Trust Company thereupon duly qualified and entered upon the discharge of its duties as (and now is) such executor (Exhibit 6, Annex B).

(4) That at all times hereinafter mentioned, up to October 8, 1917, said Hermann Sielcken, John S. Sorenson and Thorleif S. B. Nielsen were engaged in business as exporters, importers and commission merchants, as co-partners doing business under the firm name and style of Crossman & Sielcken, having their principal place of business in the Borough of Manhattan, City, County and State of New York; that by their agree-

2254 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

ment of co-partnership which bore date the 2nd day of June, 1913, it was provided among other things that the capital of said partnership, upon the termination of the partnership, from whatever cause, should belong to said Sielcken or to his estate, and that said Sorenson and Nielsen, respectively, should have an interest in the business, consisting of a percentage of the net profits that might be realized therefrom, and that in and by said agreement of co-partnership it was further pro-
2255 vided that upon the death of said Sielcken it should be the duty of the surviving partners to transfer and pay over to the executor of the Will of the deceased partner his capital and the property and business of the firm (Exhibit 3, Annex D).

(5) That all of the customers and business associates of the firm of Crossman & Sielcken were duly informed in 1913 of the creation of the new partnership of Crossman & Sielcken as aforesaid, in June, 1913 (Exhibit 3, Annex E).

(6) That said Hermann Sielcken, deceased, provided in his Will aforesaid that the management of the firm
2256 business for liquidation should be left in the hands of said Sorenson and Nielsen to the largest possible degree under the supervision of his executor (Exhibit 4).

(7) That pursuant to the provisions of said agreement of co-partnership and of the Will aforesaid, upon the death of said Hermann Sielcken, said surviving partners, Sorenson and Nielsen, did undertake to collect the assets and to proceed with the liquidation of the business and did transfer and pay over to said Columbia Trust Company, executor, the said capital and property of said firm then in their possession and/or under their control, and which had come into their possession or control. That said Columbia Trust Company, as executor, did engage, and its successor has ever since been, and now is, engaged in the supervision of the liquidation of the business of said partnership and by reason of the foregoing, said Sorenson, Nielsen and the Columbia

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2257

Trust Company, executor, is, and are entitled to collect and receive all of the assets and credits of said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution; that the said Sorenson and Nielsen in addition are entitled to receive each for his own account, twelve and one-half per cent of the net profits realized from the business (Exhibit 3, Annex D, and Exhibit 4).

(8) That the firm of Theodor Wille is a firm which 2258
is and was on all pertinent dates herein, composed of German nationals doing business in Hamburg, Germany, being composed of Gustav Diederichsen, a German national, who died resident in Germany in 1925, and Georg Georgius, a German national, who died resident in Germany in 1923 (Exhibit 3).

(9) That for many years prior to 1917, the said firm of Crossman & Sielcken transacted business in Germany and other European countries, through the firm of Theodor Wille, as a result of which contracts and business transactions, there have existed and do exist, open running accounts in dollars (United States currency), in 2259
marks (German currency) and a securities account with Theodor Wille, which said accounts have not since been satisfied. That since the sixth day of April, 1917, no business has been transacted between the said firms, Crossman & Sielcken and Theodor Wille (Exhibits 3 and 7).

(10) That, on or about September 1, 1915, the said Hermann Sielcken, deceased, entered into an agreement with Peimann, Ziegler & Company, a firm composed of German nationals, at that time owing Crossman & Sielcken and Theodor Wille, jointly, about M. 4,500,000, on account of certain coffee transactions, wherein it was agreed that Theodor Wille and Crossman & Sielcken would together assume M. 2,500,000 of the losses of said Peimann, Ziegler & Company. Thereupon, Peimann, Ziegler & Company, under date of September 1, 1915,

2260 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

entered into an agreement with Theodor Wille and Crossman & Sielcken to pay them M. 2,000,000, together with interest at 4% from November 1, 1915, in settlement of such joint account. (Exhibit 19, Annex D and E.)

Pursuant to that agreement Peimann, Ziegler & Company paid Theodor Wille on said account, the following amounts, on the dates specified (Exhibit 19, Annex A):

1918			Marks
2261 Jan.	2	By remittance (cash)	200,000.00
June	30	" 4% interest (cash)	4,000.00
Nov.	1	" M. 200,000—Deutsche Reichsanleihe 5% (valued at 98.)	196,000.00
"	1	" remittance (cash)	4,000.00
"	1	" mortgage (valued at par)	100,000.00
		Total	504,000.00

Thereafter, on or about June 30, 1919, Theodor Wille entered into an agreement with Peimann, Ziegler & Company to accept, and did accept, in settlement of the balance of said joint account, the following securities, interest and cash:

2262

1919			Marks
June	30	By 5% Deutsche Reichsanleihe	1,500,000.00
"	"	" Interest thereon	37,500.00
"	"	" Interest on mortgage	2,250.00
"	"	" 5% Deutsche Reichsanleihe—interest	5,000.00
"	"	" 4% interest	15,774.70
		Total	1,560,524.70
		Total received by Wille from Peimann, Ziegler & Company	2,064,524.70

(See Exhibit 19, Annex A.)

Theodor Wille credited "H. Sielcken account for pending liquidation" with one-half of the above amount, to wit, M. 1,032,262.35. (Exhibit 19, Annex A.)

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(11) That in March, 1916, Theodor Wille received for the account of Crossman & Sielcken the amount of M. 3,121,282.85 from the following coffee transactions, which were credited to the Hermann Sielcken, Hamburg account (Exhibit 15):

1916		Marks	
Marz 31	Fur 1/3 Anteil an Hamburger, Bremer, Triester, Valoris Kaffee	1,225,369.67	
Marz 31	Fur Anteil an Antwerpener, Valoris Kaffee	1,495,913.18	2264
Marz 31	Fur Anteil an Kommitte Vergutung Val Kaffee	400,000.00	
		3,121,282.83	

On the same date, March 31, 1916, Theodor Wille invested the foregoing Crossman & Sielcken credits in the following securities (Exhibit 15):

Face Value		Price	
M. 2,000,000	5% Deutsche Reichsanleihe of 1916	M. 1,945,000.00	
M. 1,000,000	4½% Deutsche Reichsschatzanweisungen of 1916	M. 938,750.00	2265
	Total	M. 2,883,750.00	

(12) During the months of September and October, 1916, Crossman & Sielcken in New York transmitted to Theodor Wille by cable and/or wireless transfers the sum of M. 5,675,000 at a dollar cost of $999,453.14, which Wille received and invested in the following securities (Exhibit 15):

1916	Face Value	Securities	Price
Oct. 5—	M. 530,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	M. 497,868.75

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"	6—	426,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	400,227.00
"	9—	544,000	4½% German Reichsschatzenweisungen of 1916 (Fifth Issue)	511,292.00
"	2—	500,000	5% German Reichsanleihe of 1916 (Fifth Issue)	477,638.90
"	9—	560,000	5% German Reichsanleihe of 1916 (Fifth Issue)	535,500.00
2267 "	9—	575,000	5% German Reichsanleihe of 1916 (Fifth Issue)	549,843.75
"	10—	525,000	5% German Reichsanleihe of 1916 (Fifth Issue)	502,104.15
"	12—	260,000	5% German Reichsanleihe of 1916 (Fifth Issue)	248,733.35
"	16—	260,000	5% German Reichsanleihe of 1916 (Fifth Issue)	248,877.80
"	20—	525,000	5% German Reichsanleihe of 1916 (Fifth Issue)	502,833.35
"	24—	295,000	5% German Reichsanleihe of 1916 (Fifth Issue)	282,708.35
2268		M. 5,000,000	Total	M. 4,757,627.40

(13) Theodor Wille, upon the order of Clara Sielcken delivered prior to July 2, 1921, to the following persons and bank so many of the foregoing securities as equal the par value of M. 462,800, but no more (Exhibit 19):

Nov.	1917—To Robert Koch, Jeweler, Frankfort-on-Main, Germany, for debt contracted prior to Mr. Sielcken's death	M. 210,000.00
Oct.	22, 1918—To Rheinische Creditbank, Baden-Baden	200,000.00
Mar.	1919—To Collector of Taxes for property taxes for 1918	52,800.00
	Total	M. 462,800.00

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(14) That upon the death of said Hermann Sielcken, deceased, there became due and owing, arising out of said pre-war transactions, from the firm of Theodor Wille to the said Sorenson and Nielsen, surviving partners of the firm of Crossman & Sielcken, in liquidation, stated as of April 6, 1917, including appropriate debits and credits from that date to July 2, 1921, the sums of M. 8,653,283.29 and $104,048.48, as stated below:

2270

(a) Due Crossman & Sielcken from Theodor Wille (Special Account) April 6, 1917, (Ledger J, 425—K. 404) (Exhibits 3 and 7, Schedule 1) ..... M. 1,340,587.48

(b) Due Crossman & Sielcken from Theodor Wille (Peimann, Zielger & Co., Hamburg Loan A/c) April 6, 1917 (Ledger J, 163—K. 400) (Exhibits 3 and 7, Schedule 2) 242,729.08

2271

(c) Due Crossman & Sielcken from Theodor Wille on "Herr Hermann Sielcken", Hamburg Account, stated as of April 6, 1917, together with appropriate debits and credits from that date to July 2, 1921, exclusive of avails of securities subsequent to October 8, 1917 (Exhibits 3, 15, 16, 17, 18 and Annex C of Exhibit 19) 261,366.69

Total Marks due C. & S., (a), (b) and (c) above ..... M. 1,844,683.25

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(d) Due Theodor Wille from Crossman & Sielcken (12/12 Joint a/c Coffee Options in Hamburg) April 6, 1917, (Ledger J, 421—K, 402) (Exhibits 3 and 7, Schedule 3)	M. 1,316,785.26	
(e) Due Theodor Wille from Crossman & Sielcken (Hamburg Mark a/c) April 6, 1917 (Ledger J, 411—K, 399) (Exhibits 3 and 7, Schedule 4)	M. 85,454.45	
Total Marks due Theodor Wille (d and e above)		M. 1,402,239.71
Balance of marks due Crossman & Sielcken		M. 442,443.54
(f) Due Crossman & Sielcken on account settlement Peimann, Ziegler & Co., account in 1918 and 1919 (Exhibits 3 and 19, Annex A) (Paragraph 10 above)		M. 1,032,262.35
(g) Value of German securities due Crossman & Sielcken October 8, 1917:		
M. 3,000,000 securities purchased by Wille in March, 1916 (Paragraph 11 above)	M. 2,883,750.00	
M. 5,000,000 securities purchased by Wille in October, 1916 (Paragraph 12 above)	M. 4,757,627.40	
Total	M. 7,641,377.40	
Less securities listed in Paragraph 13 above	462,800.00	
Total		M. 7,178.577.40

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Total Marks due Crossman & Sielcken		M. 8,653,283.29	
(h) Due Crossman & Sielcken from Theodor Wille (Dollar Account) on Oct. 8, 1917, plus and minus appropriate debits and credits to July 2, 1921 (Ledger J, 402—K. 390) (Exhibits 3 and 7, Schedules 5, 5-a, 5-b, 5-c)	$296,950.00		2276
(i) Due Theodor Wille from Crossman & Sielcken (Boston & New Orleans Flour a/c Oct. 8, 1917 (Ledger J, 441—K, 406) (Exhibits 3 and 7, Schedule 6)	192,901.51		
Total dollars due Crossman & Sielcken (Exhibits 3 and 7)		$104,048.49	

(15) That shortly after the death of said Hermann Sielcken, and prior to the legislation of November 10, 1917, making certain German exceptional war legislation specifically applicable to American nationals, and on or about October 11, 18, and 30, 1917, Clara Sielcken demanded of Gustav Diederichsen and Georg Georgius as members of the firm of Theodor Wille the bonds and amounts there on deposit and belonging to the estate of Hermann Sielcken and/or to Clara Sielcken and/or to Crossman & Sielcken, asking at the same time their assistance to enable her to take this property out of Germany and/or to convert the property into neutral exchange. (Exhibit 2.) 2277

(16) That the said Georg Georgius and Gustav Diederichsen as members of the firm of Theodor Wille refused to assist or enable Clara Sielcken to remove from Germany for her own account and/or for the firm of

2278 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

Crossman & Sielcken the amounts and securities there on deposit and/or to turn over to her the securities and sums which they had in their possession for the account of Crossman & Sielcken, except the securities specified in Paragraph 13 above and the sums advanced for her personal and living expenses from the Estate of Hermann Sielcken. (Exhibit 2.)

(17) That on or about October 18, 1917, a certain Will dated February 18, 1917, purporting to be the last Will
2279 of Hermann Sielcken, deceased, was duly opened before the Grand Ducal Notarial Office at Baden-Baden, Germany, and on or about November 16, 1917, Georg Georgius, Gustav Diederichsen, Carl Isenberg and Richard Isenberg were duly appointed executors thereunder. (Exhibit 6, Annex C, and Exhibit 8, Annexes A, B, and C.)

(18) That the said executors decided not to take, and did not take, over the property of Crossman & Sielcken or any property belonging to the Estate of Hermann Sielcken, deceased, or to the firm of Crossman & Sielcken. (Exhibit 6, Annex C, and Exhibit 8.)

2280 (19) That in or about the month of March, 1918, members of the firm of Theodor Wille duly prepared a report of all of the property belonging to the firm of Crossman & Sielcken and/or to Hermann Sielcken, deceased, and/or to Clara Sielcken, exclusive of the debts owing from Wille to Crossman & Sielcken, for the Treuhander fur das feindliche Vermogen, which said report Clara Sielcken signed. (Exhibit 2, Exhibit 9, page 2, and Annex I, and Exhibit 10.) That the Treuhander thereupon took under his administration the property so reported. (Exhibit 2 and Exhibit 9, pages 4 and 5, and Annex V.)

(20) That the firm of Theodor Wille made certain personal loans for account of the Estate of Hermann Sielcken, deceased, and advanced monies to Clara Sielcken for her personal and living expenses in Germany, which sums Clara Sielcken repaid from her own personal funds

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in 1921 after her return to the United States. (Exhibits 2 and 19, Annex C.)

(21) That in 1919, when Clara Sielcken was preparing to leave Germany, she was informed by Gustav Diederichsen that the firm of Theodor Wille was prohibited from delivering to her the bonds and monies of Crossman & Sielcken which they had on deposit, and from paying any debts due and owing to Crossman & Sielcken; and was further informed that she would be permitted to take out of Germany no more than 400 Marks; that Clara Sielcken thereupon left Germany in August, 1919, taking with her only 400 Marks, and a certain amount of jewelry. (Exhibit 2.)

2282

(22) That upon reaching Christiana, Norway, Clara Sielcken was able to, and did, obtain a loan by cable transfer from the Columbia Trust Company, by depositing her jewelry with den Norske Creditbank at Christiania, Norway, as security therefor; that as a result of this transaction, she was able to return to the United States. (Exhibits 2 and 11.)

(23) That the said firm of Theodor Wille at all times after October, 1917, refused to deliver the securities, with the exception of those specified in Paragraph 13 above, and/or to make any payments of the aforesaid accounts to Crossman & Sielcken and/or to Clara Sielcken (except the sums advanced for her personal and living expenses out of loans from Wille to the Estate of Hermann Sielcken, deceased), until the summer and fall of 1921, at which time they released and/or sold approximately 7,587,200 depreciated mark bonds, the prohibitions against their doing so being no longer effective. (Exhibits 2 and 19).

2283

(24) That the following books of original record of the firm of Crossman & Sielcken are submitted in support of this claim for examination by the Commission, the return of which is respectfully requested, when they have served their purpose:

2284 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

Private Ledgers D and E
Private Journal Brazil Business
Brazil Ledgers J and K
Export Journal G and H
Import Journal No. 4
Old Crossman & Sielcken Ledger, showing accounts prior to June 2, 1913.

That the return is also requested of the following original papers submitted as exhibits in support of this claim:

2285 Exhibit 3, Annex C—Partnership Agreement.
Exhibit 3, Annex D—Partnership Agreement.

(25) That claim herein, upon the facts hereinabove set forth and the evidence in support thereof, is as follows (Exhibits 3, 7, 15, 16, 17, 18, 19 and 20):

A.

Balance of Dollar accounts, in the amount of $104,048.49 and of current Mark accounts, in the amount of M. 442,443.54. To this said Mark account are to be added:

2286 (a) The share of Crossman & Sielcken in the settlement of the debt of Peimann, Ziegler & Company, in the amount of M. 1,032,262.35, this said company having made payment to Theodor Wille, for the value of which payment Theodor Wille thereafter became obligated to Crossman & Sielcken, and

(b) The value of the German Securities in the amount of M. 7,178,577.40, which securities Clara Sielcken demanded in October, 1917, and which securities the firm of Theodor Wille refused to deliver upon their own responsibility.

The total of said Mark amounts is M. 8,653,283.29.

B.

If the commission finds that claimants are not entitled to the market value of the German securities, as a debt

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2287

from Theodor Wille, on account of the failure to deliver them to Crossman & Sielcken, and the refusal to deliver them to Clara Sielcken; in 1917, and that claim in respect thereto must be for the loss sustained, on account of the depreciation in the value of the securities, due to the application thereto of exceptional war measures, then, and in that event, claim is herein made as follows:

Balance of Dollar accounts in the amount of		$104,048.49
Balance of Mark Accounts, as follows:		2288
(a) to (e) Par. 14	M. 442,443.54	
Coupons on Crossman Sielcken bonds	1,200,712.00	
Peimann, Ziegler & Co. Settlement	1,032,262.35	
In the total amount of		M. 2,675,417.89

Depreciation in the value of the securities, in the amount of M. 7,178,577.40 from October 8, 1917, to September 20, 1921, or, if the Commission finds that claimants are not entitled to depreciation after the repeal of exceptional war legislation, then to January 10, 1920. 2289

C.

If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver them to Crossman & Sielcken, and the refusal to deliver the securities to Clara Sielcken, in 1917, and that claim in respect thereto must be for the loss sustained, on account of the depreciation in the value of the securities, due to the application thereto of exceptional war measures, and further finds that claimants are not entitled to a credit to their account in the amount of their interest in the payment from Peimann, Ziegler & Company to Theodor Wille, but only to a credit of a propor-

2290 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

tionate part of the cash payment, and that claim in respect to the balance must be for the loss sustained, on account of the depreciation in the value of the securities accepted by Theodor Wille, due to the application thereto of exceptional war measures, then, in that event, claim is herein made as follows:

Balance of Dollar accounts in the amount of		$104,048.49
Balance of Mark Accounts,		
2291 as follows:		
(a) to (e) Par. 14	M. 442,443.54	
Coupons on Crossman & Sielcken bonds	1,200,712.00	
Cash in Peiman, Ziegler & Co. Settlement	184,262.35	
Coupons on Peimann, Ziegler & Co. Bonds.	74,000.00	
In the total amount of		M. 1,901,417.89

Depreciation in the value of the securities in the amount of M. 7,178,577.40 from October 8, 1917, to September 20, 1921, or, if the Commission finds that claim-
2292 ants are not entitled to depreciation after the repeal of exceptional war measures, then to January 10, 1920; depreciation in the value of securities in the amount of M. 98,000.00, paid by Peimann, Ziegler & Company, from November 1, 1918, and of securities in the amount of M. 750,000.00 from June 30, 1919, to September 20, 1921, respectively, or in the event that the Commission finds that claimants are not entitled to depreciation subsequent to the repeal of exceptional war measures, then to January 10, 1920, respectively.

(26) Claim is, in summary, as follows:

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2293

Amount	*Rate*	*Dollar Amount*	*Interest Date*
Claim A. $1,488,573.82			
M. 8,653,283.29	.16	$1,384,525.33	January 1, 1920
$ 104,048.49	—	104,048.49	October 8, 1917
Claim B.–I–$1,451,016.33			
M. 2,675,417.89	.16	$ 428,066.86	January 1, 1920
7,178,577.40	.128006	918,900.98	October 8, 1917
$ 104,048.49	—	104,048.49	October 8, 1917
Claim B.–II–$1,374,162.48			
M. 2,675,417.89	.16	428,066.86	January 1, 1920
7,178,577.40	.1173	842,047.13	October 8, 1917 2294
$ 104,048.49	—	104,048.49	October 8, 1917
Claim C.–I–$1,385,455.42			
M. 1,901,417.89	.16	$ 304,226.86	January 1, 1920
7,178,577.40	.128006	918,900.98	October 8, 1917
98,000.00	.125506	12,299.59	November 1, 1918
750,000.00	.061306	45,979.50	June 30, 1919
$ 104,048.49	—	104,048.49	October 8, 1917
Claim C.–II–$1,299,522.88			
M. 1,901,417.89	.16	$ 304,226.86	January 1, 1920
7,178,577.40	.1173	842,047.13	October 8, 1917
98,000.00	.1148	11,250.40	November 1, 1918
750,000.00	.0506	37,950.00	June 30, 1919 2295
$ 104,048.49	—	104,048.49	October 8, 1917

(27) The claimants are herewith duly filing with the American Agent the waiver in triplicate originals, in accordance with the Order of the Commission of March 25, 1925, which waiver the American Agent is requested to file with the Commission, in the event that an award is rendered with respect to the mark debts aforesaid.

WHEREFORE, upon the facts herein set forth, and the evidence filed in support thereof, the Columbia Trust Company (now the American Exchange Irving Trust Company), John S. Sorenson and Thorleif S. B. Nielsen, the claimants, hereby make claim against Germany, under the Treaty of Berlin of August 25, 1921, for:

(A) The sum of $1,488,573.82, together with interest

2296 *Exhibit B Annexed to Answering Affidavit of Selden Bacon*

at the rate of 5% a year on $104,048.49 thereof from October 8, 1917, and on the remaining $1,384,525.33 thereof from January 1, 1920, to the date of payment, respectively, or

(B) If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver the securities to Crossman & Sielcken and the refusal to deliver them to Clara Sielcken in 1917, but that
2297 claimants are entitled to compensation for the loss sustained on account of the depreciation in the value of the securities, due to the application of exceptional war measures thereto, then (I) the sum of $1,451,016.33, together with interest at the rate of 5% a year on $1,022,949.47 thereof from October 8, 1917, and on the remaining $428,066.86 thereof from January 1, 1920, to the date of payment, respectively; or (II), if depreciation is not allowed for the period subsequent to January 10, 1920, then the sum of $1,374,162.48, together with interest at the rate of 5% a year on $946,095.62 thereof from October 8, 1917, and on the remaining $428,066.86 thereof from January 1, 1920, to the date of payment,
2298 respectively; or

(C) If the Commission finds that claimants are not entitled to the market value of the German securities as a debt from Theodor Wille, on account of the failure to deliver the securities to Crossman & Sielcken, and the refusal to deliver them to Clara Sielcken in 1917, but that claimants are entitled to compensation for the loss sustained on account of the depreciation in the value of the securities, due to the application of exceptional war measures thereto, and further finds that claimants are not entitled to a credit to their account in the amount of their interest in the payment from Peimann, Ziegler & Company, but only to a credit of their proportionate part of the cash payment and are entitled to compensation in respect to the balance for the loss sustained on account of the depreciation in the value of the securities accepted

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2299

by Theodor Wille, due to the application thereto of exceptional war measures, then (I) the sum of $1,385,455.42, together with interest at the rate of 5% a year on $1,022,949.47 thereof from October 8, 1917, on $12,299.59 thereof from November 1, 1918, on $45,979.50 thereof from June 30, 1919, and on the remaining $304,226.86 thereof from January 1, 1920, to the date of payment respectively; or (II), if the Commission finds that claimants are not entitled to depreciation subsequent to January 10, 1920, then the sum of $1,299,522.88, together with interest at the rate of 5% a year on $946,095.62 thereof 2300
from October 8, 1917, on $11,250.40 thereof from November 1, 1918, on $37,950.00 thereof from June 30, 1919, and on the remaining $304,226.86 thereof from January 1, 1920, to the date of payment respectively, as provided for in said Treaty, together with a proper allowance for costs and attorneys' fees and such other and further relief as this Honorable Commission may deem just and equitable.

Dated, October 26, 1927.

Attest:

AMERICAN EXCHANGE IRVING TRUST COMPANY,
formerly the Columbia Trust Company, as 2301
Executor of the Last Will and Testament of
Hermann Sielcken, deceased.

By:

ORRIN R. JUDD
Vice-President.

JOHN S. SORENSON

THORLEIF S. B. NIELSEN

(Seal)
H. MAJOR
Asst Secy

State of New York,
County of New York, ss:

ORRIN R. JUDD, being duly sworn, says:

I am a Vice-President of the American Exchange Irving Trust Company, formerly the Columbia Trust Com-

2302 *Exhibit B Annexed to Answering Affidavit of Selden Bacon.*

pany, which, as Executor of the Last Will and Testament of Hermann Sielcken, deceased, is one of the claimants above named, and am acquainted with the facts set forth in the foregoing memorial. I have read said memorial and know the contents thereof and the same is true to my own knowledge, except as to the facts therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

ORRIN R. JUDD

2303 Sworn to before me this
26th day of October, 1927.
G. E. Osborne
Notary Public
Queens County No. 1298
Cert. filed in N. Y. Co. No. 102 Reg. No. 8064
Cert. filed in Bronx Co. No. 6 Reg. No. 2824
Cert. filed in Kings Co. No. 37 Reg. No. 8041
Term expires March 30, 1928
(Seal.)

State of New York,
2304 County of New York, ss:

JOHN S. SORENSON, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

JOHN S. SORENSON

Sworn to before me this
26th day of October, 1927.
Emilie B. Bender
Notary Public,
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8298
My Commission Expires March 30, 1928
(Seal.)

Exhibit B Annexed to Answering Affidavit of Selden Bacon 2305

State of New York,
County of New York, ss:

THORLEIF S. B. NIELSEN, being duly sworn, says:

That he is one of the claimants above named; that he has read the foregoing memorial and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

THORLEIF S. B. NIELSEN 2306

Sworn to before me this
27th day of October, 1927.
Emilie B. Bender
Notary Public,
Kings County No. 148
Cert. filed in N. Y. County No. 340
New York Register's No. 8298
My Commission Expires March 30, 1928
(Seal.)

2307

2308 **Exhibit C Annexed to Answering Affidavit of Selden Bacon.**

8304
Resp. Irv. Tr. Ex. 10095, a
1/18/35 (L. C.)

BEFORE THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY.

2309 UNITED STATES OF AMERICA On behalf of COLUMBIA TRUST COMPANY (now the American Exchange-Irving Trust Company), as Executor of the last Will and Testament of Hermann Sielcken, deceased, and JOHN S. SORENSON and THORLEIF S. B. NIELSEN, surviving partners of the firm of Crossman & Sielcken,

vs.

GERMANY and the firm of THEODOR WILLE,

2310 Impleaded.

Docket No. 8304
List No. 6207

Answer of the German Agent Under Rule IV-b (1)

Note: The "Memorial" referred to in the present Answer is the "Memorial for Claim" prepared and submitted by the claimants, which "Memorial for Claim" is attached as "Annex I" to the "Memorial" of the United States in Support of the "Claim" filed by the Agent of the United States.

I. *Statements as to Facts.*

The facts as stated in the Memorial will not be disputed, with the following exceptions:

a) In Par. (1) of the Memorial it is contended that Hermann Sielcken was, on all dates pertinent herein and

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until the time of his death on or about October 8, 1917, a citizen of the United States, "residing in the United States, although temporarily residing in Germany at the time of his death"; it is also contended that Clara Sielcken is, and was on all dates pertinent herein, a citizen of the United States, "residing in the United States, although in Germany at the outbreak of the War." These contentions are contradicted by the facts that the late Hermann Sielcken and his wife owned, maintained, and inhabited a palatial estate near Baden-Baden (in Germany) while in New York they had merely a suite in a hotel; that in the last Will and Testament of March 23, 1914 (Exh. 4), which Last Will and Testament was apparently made in New York, Hermann Sielcken called himself "Hermann Sielcken, of Baden-Baden, Germany"; and in the same Will he directed that all of his estate should be administered and distributed in Germany, under the laws and in the tribunals of "Germany, my domicile"; and that in the Decree of the Surrogate's Court of the County of New York of January 26, 1918 (*Exhibit 6-B*), *admitting* the said Will to probate, it was expressly stated that Hermann Sielcken was at the time of his death "a resident of Baden-Baden, Germany."

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b) In Par. (2) of the Memorial it is contended that Hermann Sielcken "left a last Will and Testament, wherein he named 'Columbia-Knickerbocker Trust Company,' executor with respect to all property left by the said Hermann Sielcken in the United States of America, and particularly with respect to the liquidation of the firm of Crossman & Sielcken * * *"

This statement is neither accurate nor complete. The pertinent provisions of said Will read as follows:

> "I appoint Gustav Diederichsen, and his brother Heinrich Diederichsen of Kiel, Germany, and my brothers-in-law, Carl Isenberg and Richard Isenberg, residing in Germany, the executors of this my will.
>
> "I also appoint the 'Columbia Knickerbocker Trust Company of New York, executor of this will, *for the*

2314 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

purpose of collecting and converting into cash all my property situated in the United States of America, and I direct said Company to transmit and pay over all the net proceeds thereof to my said executors in Germany for administration and distribution by them.

"It is my wish that all my estate should be administered and distributed in Germany, under the laws and in the tribunals of Germany, my domicile.

2315 . . . . . .

"Whereas, since the death of my late partner, George W. Crossman, in the firm name of Crossman & Sielcken, I have become the sole owner of the property and business of that firm and I have admitted into partnership John S. Sorenson and Thorlief S. B. Nielsen to continue the business of the said late firm under the same firm name; and the Articles of Co-partnership made between us, bearing date the 2nd day of June, 1913, provide that in case of my death the said partnership shall come to an end and that *it shall then be the duty of the surviving*

2316 *partners to transfer and pay over to the executor of my Will all the capital property and business of the said firm.*

"It is my desire that my executor, the *Columbia Knickerbocker Trust Company should leave the management of the firm business for liquidation in the hands of the said Sorenson and Nielsen, to the largest possible degree under the direct* supervision of the said trust Company."

This language shows that the task entrusted to the Columbia Knickerbocker Trust Company was more restricted than would appear from the above statement in the Memorial.

c) In Par. (3) of the Memorial it is contended that after the Will of March 23, 1914, had been admitted to probate the Columbia Trust Company "duly qualified

and entered upon the discharge of its duties as, and now is, such executor."

Even assuming that the Columbia Trust Company did acquire the legal status of executor, the contention that said Company "now is executor" would not be supported by the evidence on record. The record is silent as to the activities of the Columbia Trust Company in its alleged capacity as executor, regarding the progress made in the liquidation of the estate, and regarding the ultimate fate of the net proceeds thereof. The Columbia Trust Company is requested to make a full and detailed statement covering these points, which statements should be accompanied by documentary evidence to support its correctness. The Columbia Trust Company is especially requested to state whether it ever made a final report or accounting to the Surrogate's Court or to the Alien Property Custodian, to the German executors or to the residuary heir, and whether it was ever discharged by any of these agencies and/or persons.

d) A similar disclosure is requested concerning the activities of the claimants John S. Sorenson and Thorleif S. B. Nielsen with regard to whom it is contended in Par. (7) of the Memorial that, in their capacity as liquidators, they are still entitled "to collect and receive all of the assets and credits of said firm of Crossman & Sielcken and to procure and recover upon any and all causes of action and claims of whatever nature, existing in favor of such firm at the time of its dissolution * * *"

It is pertinent to remark, in this connection, that in a cable to the firm of Theodor Wille under date of February 4, 1928, Mr. Nielsen stated: "* * * I have had nothing to do with the liquidation since estate settled with me in June nineteen hundred twenty-one * * *."

e) The figures referred to in Par. (10) to (14) of the Memorial are not in all respects correct. The discrepancies between the figures presented in the Memorial and the correct figures, as shown by the books of the

2320 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

firm of Theodor Wille, will be referred to hereafter in dealing with the individual items of the claim.

f) In Par. (15) and (16) of the Memorial it is contended that Gustav Diederichsen and Georg Georgius in their negotiations with Clara Sielcken, concerning the delivery of the bonds, pertaining to the estate, acted in their capacity "as members of the firm of Theodor Wille." This contention is not borne out by the evidence of record and will not be admitted.

2321 g) In the same paragraphs (15 and 16) it is contended that Mrs. Clara Sielcken demanded of Gustav Diederichsen and Georg Georgius the delivery of bonds pertaining to the estate for the purpose of taking them out of Germany and/or converting them into neutral exchange, and that Georg Georgius and Gustav Diederichsen refused complying with such request. The evidence submitted in support of those contentions is not conclusive (Exhibits a to m).

h) In Par. (17) of the Memorial reference is made to the Will of Hermann Sielcken, drawn at Baden-Baden on February 18, 1917. In Par. (18) of the Memorial it is
2322 contended that the executors appointed under the same Will decided not to take, and did not take, over the property of Crossman & Sielcken or any property pertaining to the estate of Hermann Sielcken, deceased, or to the firm of Crossman & Sielcken.

These contentions are not supported by the evidence of record and will not be admitted.

It should be noted that on March the 29th, 1920, the executors appointed under the Will of February 18th, 1917 (not those appointed under the Will of March 23, 1914) entered into an agreement with the Columbia Trust Company wherein it was expressly stated that the said executors had duly qualified as such, that they are engaged in the administration and settlement of the estate of Hermann Sielcken, deceased, and they have paid all debts and claims against the estate of said decedent with certain exceptions, and that they still hold undistributed assets of the estate (Exhibit 6 C).

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2323

i) In Par. (19) of the Memorial it is contended that members of the firm of Theodor Wille prepared a report for the Treuhaender fuer das feindliche Vermoegen, and that the Treuhaender thereupon took under his administration the property so reported. As a matter of fact the report to the Treuhaender was prepared by Gustav Diederichsen in his capacity as executor and was signed by Clara Sielcken. In replying to the report the Treuhaender stated the following:

"In view of the patriotic sentiment shown by your 2324
deceased husband through substantial subscriptions and donations of various kinds I refrain from the measures usual in other cases, such as the restriction of the enjoyment of interest, etc.

Only in case you should effect a substantial alteration of your property you will please inform me.

(Exhibit m)

II. *Issues of Law.*

A. *The claim is not properly presented.*

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1) The Columbia Trust Company has never been executor of the Hermann Sielcken Estate. The Letters testamentary granted unto the Columbia Trust Company by the Surrogate's Court of the County of New York, on January 26, 1918 (Exhibit 6, Annex B), were manifestly issued in ignorance of the Joint Testament of February 18, 1917 (Exhibit 8, Annex A), superseding the Testament of March 23, 1914 (Exhibit 4). The said Letters Testamentary were, therefore, devoid of legal effect.

The agreement of March 29, 1920 (Exhibit 6, Annex C), could not possibly vest in the Columbia Trust Company the legal character of executor not provided for in the Will of Hermann Sielcken. Whatever may have been the intention of this instrument, its legal effect was,

2326 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

at best, to ratify the preceding administrative acts of the Columbia Trust Company and to confer upon the said Columbia Trust Company a limited power of attorney derived from the authority of the German executors.

Even under the assumption that the Columbia Trust Company did obtain the position of executor of the Will of Hermann Sielcken, deceased, of March 23, 1914, the record fails to support the contention that the author-
2327 ity to act in such capacity still exists.

And even under the assumption that such authority still attaches to the Columbia Trust Company, the said authority would not include the right to make the instant claims for the reason that these claims do not constitute a part of the property of Hermann Sielcken, deceased, which is "situated in the United States of America."

2) The right of John S. Sorenson and Thorleif S. B. Nielsen to act in their alleged capacity of Liquidators of the firm of Crossman & Sielcken, will depend on the question whether or not the liquidation proceedings are still pending and whether said Sorenson and Nielsen have ever been discharged.

2328 That John S. Sorenson and Thorleif S. B. Nielsen are not entitled to make the present claim in their capacity of partners of the firm of Grossman & Sielcken, is manifest from the record as it stands. According to the Partnership Agreement (Exhibit 2, Annex D) John S. Sorenson and Thorleif S. B. Nielsen never had any right or interest of their own in any property or other asset belonging to the firm of Crossman & Sielcken. The entire business capital was owned by Hermann Sielcken alone, and he alone had to bear and pay all losses of the firm. After the partnership had been dissolved by the death of Hermann Sielcken, the entire business capital became a part of the Hermann Sielcken Estate. There was no liquidation of the firm in the sense of a distribution of the business capital among the surviving members of the dissolved partnership. Under Article II of the Partnership Argeement, the surviving partners

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2329

had merely to transfer and pay over to the executor of Hermann Sielcken the capital and also all property and business of the firm. It is illustrative, in that respect, that apparently the entire business capital of the firm of Crossman & Sielcken was taken over by the Alien Property Custodian under the Trading with the Enemy Act, no exception being made with regard to any portion of the business capital in favor of Messrs. Sorenson and Nielsen. The interest of John S. Sorenson and Thorleif S. B. Nielsen was confined absolutely 2330
to their share of 12 1/2 per cent of the net profits of the business.

Assuming that the claims made in the instant case are valid, and assuming furthermore that the value of these claims would increase the net income for the last business year, the only right of said Sorenson and Nielsen would be that of making claim against the Estate of Hermann Sielcken for their share in such additional net profits of the business. Whether or not even such a claim could be asserted is doubtful in the light of the provision of Article XIII of the Partnership Agreement. According to this article, neither of the two persons in question is entitled to bring any action against 2331
the Estate of Hermann Sielcken for any share in the profits of the business, other than or different from that fixed and established by the balance sheets.

3) It will be contended in particular that the accounts carried by the firm of Theodor Wille in the name of "Hermann Sielcken" (Exh. 15, 16, 17, 18, and Annex C of Exhibit 19) were, since Hermann Sielcken's death subject to the unrestricted disposition of Mrs. Clara Sielcken and/or the German executors in the same way as during Hermann Sielcken's lifetime they had been subject to his personal disposition.

The significance of the foregoing objections is not restricted to that of a technical procedural defence. They have a direct bearing on the merits of the claims presented against the firm of Theodor Wille in that the claimants attempt to construct separate debts due to that

2332 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

part of Hermann Sielcken's estate which was formerly invested in the partnership of Crossman & Sielcken, while, if the relations between the firm of Theodor Wille and the estate of Hermann Sielcken are considered as a whole, such an indebtedness of Theodor Wille would clearly not exist. The separation of that part of the estate of Hermann Sielcken which was formerly invested in the partnership of Crossman & Sielcken is not merely highly technical and artificial, but also without foundation in the partnership agreement and in the Will of
2333 Hermann Sielcken. Even as a matter of practical business procedure a separate consideration of the legal relations originating from transactions of the former partnership is devoid of any appearance of justification after the proceeds of the liquidation of the said partnership have been turned over to Mrs. Sielcken, the only residuary heir.

B. *The claim against the firm of Theodor Wille.*

Insofar as the claim is based on debts allegedly due from the firm of Theodor Wille, the defense is presented
2334 by the debtor firm in a written argument which is filed herewith as Exhibit n, which is supported by a folder of evidence, filed herewith as Exhibit o, and which argument, by reference, is made part of the present Answer.

The defense may be summarized as follows:

1) All legal relations which have ever existed between the firm of Theodor Wille, on the one hand, and Hermann Sielcken and/or his estate and/or the firm of Crossman & Sielcken, on the other hand, have been finally settled through correspondence between the firm of Wille, on the one hand, and Clara Sielcken and Mr. Nielsen, on the other hand. Moreover, the correctness of the accounting rendered by Theodor Wille has been admitted by implication through the failure of all persons possibly authorized to act on behalf of the estate of Hermann Sielcken, or any part thereof, to object against such accounting, and through the withdrawal of the claim against Theodor Wille in 1924 (Exhibit n p. 1, 2, 3).

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2) In the alternative it will be contended that the credit balances for which claim is made are partially based on an erroneous method of bookkeeping, that they have partly been satisfied by direct action, and that the remaining ones are more than covered by the balances due to Theodor Wille. In dealing with the individual items we follow the enumeration of par. 14 of the Memorial.

3) Balance due Crossman & Sielcken from Theodor Wille (Special Account), (14 a of the Memorial).

The correct amount of the credit balance, due Crossman & Sielcken from Theodor Wille, calculated as of April 6th, 1917, is M. 1,328,388.13, instead of M. 1,340,587.48, as stated in the Memorial. This credit balance is fully covered by the debit balance in the amount of M. 1,402,239.71, due to Theodor Wille under items 14 d, and 14 e, of the Memorial (Exhibit n, p. 4, 7 and 8). 2336

4) Credit balance due Crossman & Sielcken from Theodor Wille (Peimann, Ziegler & Co., Hamburg, Loan Account), (14 b of the Memorial).

This item is a part of the "Hermann Sielcken" account, presented under 14 c of the Memorial, and dealt with under point (5) *infra* (Exhibit n. p. 4, *et seq.*) Item 14 b of the Memorial is arbitrarily separated from this account and constitutes a partial duplication thereof. 2337

5) Credit balance due Crossman & Sielcken from Theodor Wille on "Hermann Sielcken" account (14 c of the Memorial). It appears that the claimants arrive at a credit balance on this account in the amount of M. 261,366.69, by arbitrarily eliminating therefrom credit items representing avails from securities accrued subsequent to October 8th, 1917, and debit items representing payment made by Theodor Wille to Mrs. Clara Sielcken after the death of Hermann Sielcken. A statement showing the actual development of this account is presented in the defendant's Reply (Exh. n, p. 5 and 6). It appears that this account was overdrawn for a

2338 *Exhibit C Annexed to Answering Affidavit of Selden. Bacon*

considerable period subsequent to April 6th, 1917, that in 1921 it showed a temporary credit balance on account of a postwar transaction, and that the credit balance remaining on September 1st, 1922, was satisfied by direct action of the parties (Theodor Wille and Mrs. Clara Sielcken).

6) Debit balance due Theodor Wille from Crossman & Sielcken on joint account Coffee Options in Hamburg (14 d, of the Memorial).

2339 And debit balance due Theodor Wille from Crossman & Sielcken on Hamburg Mark Account (14 e of the Memorial).

These items are in harmony with the books of Wille. The total of these two items M. 1,402,239.71, stated as of April 6th, 1917, exceeds by a sum of M. 73,851.58 the amount of M. 1,328,388.13, due Crossman & Sielcken from Theodor Wille on the same date on Special Account (14 a of the Memorial). (See Exhibit n, p. 7 and 8.)

7) Credit balance due Crossman & Sielcken on account of settlement Peimann, Ziegler & Co. (14 f of the Memorial). The total of this item should be M. 1,127,440.90,

2340 instead of M. 1,032,262.35. This total embraces German Government Loan in the amount of M. 848,000— and currency in the amount of M. 279,440.90. With regard to these assets there was no obligation on the part of the firm of Theodor Wille other than that to turn them over to Crossman & Sielcken and/or Hermann Sielcken and/or his estate. This has been done. The cash amount has been credited to the account of Hermann Sielcken and satisfied as a part thereof (par. 5 *supra*). The government Loans were disposed of according to instructions of Hermann Sielcken and/or Clara Sielcken (Exhibit n, p. 9 and 11).

In case it should be contended that the payments made by Peimann, Ziegler & Co. to Theodor Wille failed to satisfy the obligations of Peimann, Ziegler & Co., claim for additional payments should be made against this firm.

Exhibit C Annexed to Answering Affidavit of Selden Bacon 2341

8) Securities (14 g of the Memorial)

All the securities referred to in par. 14 g of the Memorial were disposed of according to instructions of Hermann Sielcken and/or Clara Sielcken (Exhibit n, p. 11). It is not evident for what legal reason the amount invested in these securities should be due as a debt from the firm of Theodor Wille.

Moreover, the claim has not been notified to the German Government within the time limit agreed upon between the two Governments (Exhibit o, No. 11). 2342

9) Credit balance due Crossman & Sielcken from Theodor Wille on Dollar Account (14 h of the Memorial).

It will be admitted that this credit balance was in existence on October 8th, 1917, in the amount of $196,619.68, which amount is more than covered by the balance due to Theodor Wille under item 14 i of the Memorial.

The remainder of item 14 h amounting to $100,330.32 as of the same date refers to the so-called Prado transaction. Under this transaction Theodor Wille owed to Crossman & Sielcken Marks, not Dollars. The correctness of this view was expressly agreed to by Mrs. Clara Sielcken in her letter of June 29, 1922 (Exhibit o, No. 33). The mark amount corresponding to the above dollar amount has been satisfied by direct action between Theodor Wille and Mrs. Clara Sielcken (Exhibit p. 8, 9, 12). 2343

10) Debit balance due Theodor Wille from Crossman & Sielcken on Boston and New Orleans Flour Account (14 i of the Memorial).

The dollar balance due to Theodor Wille should be increased by an amount of $26,989.80, representing the value as of October 8, 1917, of a loan amounting to $30,000, made by Theodor Wille to Mrs. Clara Sielcken after the war. The total due Theodor Wille as of the date of October 8th, 1917, would then amount to $220,018.41 which amount is substantially in excess of the dollar balance due Crossmann & Sielcken under Item 14 h of the Memorial (Exhibit n, pp. 13 and 14).

2344 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

C. *Bond Claim against the German Government.*

The financial liability of the German Government for the depreciation of the securities referred to in the Memorial will be contested for the following reasons.

1) The claim has not been notified to the German Government within the time limit agreed upon between the two Governments. The original petition filed by the claimants (Exh. o No. 11) is confined to the claims for
2345 mark and dollar accounts, but has no reference to the depreciation of bonds.

2) The claim for the depreciation of securities as presented in the Memorial disregards the fact that securities in the nominal amount of M. 1,000,000.— were disposed of in March 1917 upon instruction of Hermann Sielcken (Exhibit o, No. 35).

3) The evidence on record fails to show that the loss sustained by Hermann Sielcken Estate as a result of the depreciation of the German securities was proximately caused by the German war legislation.

2346 a) The evidence submitted in support of the claimants' contentions is in substance confined to the testimony of Mrs. Clara Sielcken, an interested witness. This evidence is not conclusive in itself. Moreover, it is in certain points in conflict with the evidence filed herewith (Exhibits a to m).

b) Even assuming that the statements of Mrs. Sielcken are correct, it would appear that the German executors were entitled to, and did refuse the delivery of the securities to Mrs. Sielcken for reasons other than the existence of German war legislation.

The securities, as well as any other part of the estate, were subject to the right of the creditors of the estate including the creditors of the former firm of Crossman & Sielcken. A complete delivery of the proceeds of the estate could not be made before the degree of the indebtedness to the said partnership was established which

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could not be done while the connection with the United States was interrupted.

On the other hand, Mrs. Sielcken being a resident of Germany, the delivery of the securities to her was not prevented by the German war legislation.

Even the Treuhaender did not forbid such delivery after the securities had been reported to him (Exhibit m).

In case the executors should have proceeded upon an erroneous conception of the German war legislation, such a mistake of the executors would not make Germany responsible for the results thereof.

2348

c) It is not shown by the testimony of Mrs. Sielcken, nor is it probable in itself, that the securities, had they been delivered to Mrs. Sielcken, would have been converted into currency or securities other than German bonds before Mrs. Sielcken obtained the opportunity to travel to the United States. While in the light of the evidence filed herewith, it is little probable that any intention of Mrs. Sielcken to leave Germany would have encountered difficulties on the part of the German authorities (Exhibits c-l), it is a notorious fact that American citizens remaining in Germany after the declaration of war used to meet with very serious difficulties on the part of the American and neutral authorities when applying for passports or vise (Exh. k). The record is silent on any attempts made by Mrs. Sielcken in that respect. A full disclosure is requested.

2349

d) In case the Commission should hold that Germany is liable in principle for the loss resulting from the depreciation of the securities, the German Agent respectfully requests permission to submit further arguments concerning the measure of damages.

Washington, D. C. November 6, 1928.

Of Counsel.
(M.v.d Decken)

Karl von Lewinski
Agent of Germany.

2350 *Exhibit C Annexed to Answering Affidavit of Selden Bacon*

The undersigned, Joint Secretaries of the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement between the two governments signed at Berlin on August 10, 1922, do hereby certify that the foregoing, according to its purport, is a true copy of a record of said Commission.

In Witness Whereof, we have hereunto subscribed our names and affixed the seal of the said Commission at Washington, this 26th day of March, 1934.

2351 (Seal)

E. RUSSELL LUTZ,
American Joint Secretary.
ALFRED LEDORS,
German Joint Secretary.

2352

Exhibit D Annexed to Answering Affidavit of Selden Bacon. 2353

BEFORE THE MIXED CLAIMS COMMISSION
UNITED STATES AND GERMANY

ORGANIZED UNDER THE AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY.

UNITED STATES OF AMERICA on Behalf of COLUMBIA TRUST COMPANY (now Irving Trust Company), as Executor of the Last Will and Testament of Hermann Sielcken, Dec'd., and JOHN S. SORENSON and THORLEIF S. B. NEILSEN, surviving partners of the firm of Crossman & Sielcken, Claimants, and the firm of Theodor Wille, Impleaded v. GERMANY.	Docket No. 8304 List No. 6207

2354

This claim having come before the Commission for decision, the American and German Agents having been heard, the claim having been finally submitted, and due consideration having been had, the Commission decides that, under the Treaty of Berlin of August 25, 1921, and in accordance with its terms and under rules and decisions heretofore announced, the Government of Germany is obligated to pay to the Government of the United States on behalf of Columbia Trust Company (now Irving Trust Company) as Executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorleif S. B. Neilsen surviving partners of the firm of Crossman and Sielcken, American Nationals, the sum of Five hundred fifty-eight thousand eight hundred twenty-seven dollars and eighty-five cents ($558,827.85), together with interest thereon at the rate of five per cent per annum from April 1, 1918, to date of payment. 2355

Done at Washington April 21, 1930

CHANDLER P. ANDERSON
American Commissioner.

W. KIESSELBACH
German Commissioner.

2356 **Exhibit E Annexed to Answering Affidavit of Selden Bacon.**

July 21, 1938.

Attorney General of the United States,
Department of Justice,
Washington, D. C.

Attention Mr. McNamara

In re Sorenson and Nielsen, etc. vs. Sutherland, as Alien Property Custodian, White, as Treasurer of the United States, and Zentral Einkaufsgesellschaft, defendants.

2357

My dear Sir:

The papers of which I desire copies from the Alien Property Custodian's files are all papers relating to the remittance to the Alien Property Custodian or alleged seizure by him of the sum of $100,000 held for account of Hermann Sielcken in Trust No. 1.

I would also like, if permissible under the practice of the office, to have a copy of the report of the Assistant
2358 Attorney General, Mr. Rhodes, to the Solicitor General, made in March 1930, recommending that no appeal be taken from the decree of December 30, 1929, in the Zentral Einkaufsgesellschaft case entitled in the United States District Court for the Southern District of New York. I find a number of references to this report of Mr. Rhodes and would be glad to see what it stated.

I am,

Yours respectfully,

SELDEN BACON
Counsel for Irving Trust Company as Executor of Hermann Sielcken, deceased.

Exhibit F Annexed to Answering Affidavit of Selden Bacon. 2359

Address reply to
"The Attorney General
Alien Property Bureau"
and refer to
Initials and number

SEW:HLJ
9-17-9-4394

DEPARTMENT OF JUSTICE 2360
WASHINGTON, D. C.

July 23, 1938.

Selden Bacon, Esq.,
c/o Duer, Strong & Whitehead,
15 Broad Street,
New York, New York.

Re: Sorenson & Nielsen etc. v. Sutherland, White and Z. E. G., United States District Court for the Southern District of New York, Equity No. 44-28

2361

Sir:

Your letter of July 21st in which you state that you desire copies of certain papers relating to the remittance to the Alien Property Custodian of the sum of $100,000 for the account of Hermann Sielcken in Alien Property Trust No. 1 has been received. You request also a copy of the report of Special Assistant Rhodes to the Solicitor General recommending that no appeal be taken from the decree of December 30, 1929 in the Zentral Einkaufs-Gesellschaft case.

Consideration will be given to your request, and you will be advised promptly as to the documents which may be properly furnished to you.

Respectfully,

For the Attorney General
SAM E. WHITAKER
SAM E. WHITAKER,
Assistant Attorney General

2362 **Stenographer's Minutes of 1929 Trial.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
vs.
2363 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

In Equity No. 44-28.

Before Honorable Francis G. Caffey, District Judge.

New York, December 20th, 1929; 2:00 P. M.

Appearances:

Barnes, Avery & Whiting, Solicitors for Plaintiffs, Earl B. Barnes, and George W. Alger, Counsel.

2364 Charles H. Tuttle, United States Attorney, Solicitor for defendants Sutherland and White.

Thomas E. Rhodes, Special Assistant to the Attorney-General, Counsel.

Arthur Garfield Hays, Solicitor for defendant Zentral Einkaufs-Gesellschaft.

Arthur Garfield Hays, and William Abramson, Counsel.

Opening statement of Mr. Barnes.

Mr. Barnes: This suit, if your Honor please, is brought under Section 9 of the Trading with the Enemy Act.

The plaintiffs are the surviving liquidating partners of Crossman & Sielcken, a New York copartnership.

There are two defendants, perhaps three defendants, the Alien Property Custodian, the Treasurer of the United

States, those two being made defendants as required by the provisions of the Act, and then a German corporation by the name of Zentraleinkaufs-Gesellschaft, to which, for the sake of brevity, we have learned to refer as Z. E. G.

The object of the suit is to secure payment to the plaintiffs from property of Z. E. G. which is held by the Custodian and the Treasurer of a debt which the plaintiffs claim was owing to them by Z. E. G. The amount claimed is $380,761 with interest.

All of the defendants have appeared in the suit and have answered and are before your Honor.

2366 It is not the case with which you are most familiar, of a claimant endeavoring to get his own property back. We have had a great many of those claims. But this suit is brought under that provision of the Act which says that any person to whom a debt is owing may bring a suit to establish the debt. In other words, the Government has given practically an attachment remedy to American firms for the payment of their claims against enemies out of this fund.

The claim here arises out of transactions that took place in the spring of 1915, when Germany and England were at war and of course several years before this country entered the war. The defendant Z. E. G. at that time was 2367 the purchasing agency of the Imperial German Government.

The Court: Were the transactions completed prior to the entry of this country into the war?

Mr. Barnes: All of the transactions were completed in the spring of 1915, two years before this country entered the war.

The claim arises by reason of the seizure by the British Government of six shipments of food which were purchased in this country by the plaintiffs and were shipped to neutral Baltic ports on neutral vessels consigned to persons in Copenhagen.

These vessels on the way over were intercepted by the British and they seized these particular food cargoes and took them to a British port and condemned them upon the ground that they were contraband of war, that they

2368 *Stenographer's Minutes of 1929 Trial*

were destined for consumption in Germany. That is how this particular litigation has arisen.

The plaintiffs' contention is that in purchasing and shipping these cargoes, they were acting merely as purchasing agents of the defendant Z. E. G.; that we consigned them to persons designated by Z. E. G. and that we were to be repaid by Z. E. G., our advances for the cost of the merchandise and our advances for the shipments and for the freight and for the insurance and a commission of 10%.

2369 That was the understanding between the parties, that we were acting over here to buy this stuff for Germany and to ship it under a 10% commission for our services and we were to advance the money.

The amount involved represents the invoice value, the freight, the insurance and the 10% commission on these six seized cargoes.

Of course what happened here took place fifteen years ago. The original arrangements were made in September of 1914. At that time Hermann Sielcken, the senior member of the plaintiffs' firm, Crossman & Sielcken, was in Germany. He had a summer place in Germany and it was his custom to go there every summer. At the time

2370 when this war suddenly broke out, as you recall, between the Allied Powers and the Central Powers, Mr. Sielcken and his family were in Germany. He died in 1917—

The Court: Before or after the United States entered the war?

Mr. Barnes: After the United States entered the war, on October 8, 1917.

I might say here that the defendant Z. E. G. was organized in January, 1915, as a corporation and that it took over and assumed all of the obligations and business transactions that had theretofore been conducted by a German Imperial Government purchasing agency, known as the Reichseinkauf. Mr. Sielcken's arrangements over there were made with the Reichseinkauf originally.

Substantially the only evidence that we have of the arrangement that he made over there with Z. E. G. or its predecessor, the Reichseinkauf, is in the form of writings

which passed between the Reichseinkauf and Z. E. G. and Mr. Sielcken together with certain admissions that are made by the defendant Z. E. G. in its answer to our Memorial before the Mixed Claims Commission of the United States involving this same question.

In other words, not only have we filed a suit here under the Trading with the Enemy Act, but we also filed a Memorial before the Mixed Claims Commission against Germany and Z. E. G. and in that Memorial we set out and stated a number of facts and exhibits and Z. E. G. in Germany answered that Memorial and made certain admissions therein on which we also rely as evidence of the 2372
arrangements between the parties.

The Court: Are they required to answer when you file a Memorial?

Mr. Barnes: Yes, and they did answer.

We feel that these letters, in conjunction with the matter in which the business was done, clearly show that Crossman & Sielcken in purchasing and shipping these cargoes were acting as agents of the defendant Z. E. G.

Without going into the details of the evidence, I should like to state that they show not only that Z. E. G. told us what to buy, not only that they told us of whom to buy, but that they told us to whom it should be consigned, 2373
they told us how the bills of lading should be made out, and they told Hermann Sielcken how he should communicate with his friends over here, as they were called in the correspondence.

Every detail of the business apparently was dictated by Z. E. G. to Mr. Sielcken when he was over in Germany and we claim that a reading of this correspondence and the fact that the goods were consigned to agents appointed by Z. E. G., paid by Z. E. G., will clearly indicate that the relations between the parties were really those of principal and agent, that we were simply buying this stuff on a 10% commission. The original agreement specifies that we were to be paid a 10% commission, the word "commission" is used.

Of course, in view of the British ascendancy of sea power at the time, it was necessary to camouflage or dis-

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guise in a way the German ownership in these transactions. Otherwise the goods would be intercepted on the high seas and confiscated.

But whatever was done in that line was done under instructions from the other side.

So our first point, our chief point and our main point is that on the correspondence that will be introduced in evidence before your Honor here and on the agreed facts stipulated as to how the work was done you can reach no other conclusion but that we were really agents working on a commission basis and therefore we would fall
2375 within the familiar rule that an agent is entitled to be reimbursed for his advances made in the conduct of his principal's business and that we are not to suffer the loss of these cargoes by reason of the fact that through no fault of ours they were intercepted on the high seas and condemned by the British Prize Court.

So far as the Government is concerned in this action the Alien Property Custodian and the treasurer of the United States, as I understand it, their position is chiefly that of a stakeholder. This particular fund, as I understand it, under the Settlement of War Claims Act, if it is not paid to us as creditors of the enemy, will go into
2376 the German Reparations Fund to be paid to the creditors of Germany. The United States Government has not any financial interest whatsoever in the result of our particular litigation here. The money will undoubtedly go to pay Germany's creditors. If we are not a creditor so established in this action, it will go to pay other creditors who are established before the Mixed Claims Commission.

So far as the defendant Z. E. G. is concerned, there have been several defenses interposed, I think seven or eight. One of them is that there was an express agreement between Mr. Sielcken and the Reichseinkauf, that Mr. Sielcken would take the risk of seizure for doing this business, that is that there was an express understanding. Upon that point we think that the defendants will be unable to establish such a defense. Of course, if such a defense is established to your Honor's satisfaction, it will be a good defense.

Another defense is that the agreement was not an agency agreement at all, but was really a sale by Crossman & Sielcken to the Reichseinkauf and that it was expressly understood that title to the merchandise should remain in Crossman & Sielcken until it was actually delivered safely in the Baltic seaports.

We think on that point that even if there was a sale nevertheless under the form in which the transaction went through at the time of the seizure, title had passed to Z. E. G. and the risk was on them and therefore we are entitled to be paid.

There are several other defenses which we think are 2378
wholly insufficient in law. I shall not endeavor to go into them because I have no doubt Mr. Hays can explain them very much better than I can.

Opening Statement of Mr. Hays.

Mr. Hays: If your Honor please, the defendant Z. E. G. relies chiefly upon the fact that the original notification given to Crossman & Sielcken by the Reichseinkauf, which was succeeded by the Z. E. G., imposed no obligation on them whatever and so I am going to ask you to look at Exhibit A attached to the answer.

Apparently at the time this letter was written, in 2379
September, 1914, notification was given by Mr. Richter for the Reichseinkauf, which might have been given to any number of parties, not merely to Sielcken.

It merely confirmed the fact that the Reichseinkauf in Hamburg had been commissioned to receive in Baltic ports cargoes of food stuffs, and then it said the Reichseinkauf will pay for those cargoes the value c. i. f. Baltic seaports; that is the value of invoice plus freight and insurance expenses plus 10% commission.

In other words, the German Government, anxious to get food stuffs, might have given this notification broadcast, not merely to Sielcken.

The main question in this case is whether they were obliged to pay for cargoes even though the cargoes were not received in Baltic seaports.

That notification is the very basis of this case. Without that of course the plaintiff could have no claim. The first question is, what is meant by that notification?

Richter merely advises the person to whom it goes that the Reichseinkauf has been commissioned to receive. He does not say even that they will receive. There is no contract to buy. Nobody is appointed agent. He says they are commissioned to receive certain goods in Baltic seaports.

I say to your Honor that we must assume they were reasonably intelligent people when they did that. Had
2381 they intended to appoint anybody their agent over here or had the goods when shipped, been owned by anybody in Germany, the goods would have immediately been subject to seizure as enemy goods.

I cannot conceive of any government establishment doing such a preposterous thing as agreeing to take title to goods before those goods reached the Baltic seaports and I believe that an instrument like this must be construed based upon the reasonable probabilities as they existed at the time.

So long as you had neutral goods on neutral vessels destined for neutral ports, they were not, under Inter-
2382 national Law, at that time, subject to seizure.

This was conditional contraband. It would have been necessary to prove that the goods were going to the armed forces of the enemy.

You will note that about twenty-four cargoes were shipped and not one of these cargoes was seized until April, 1915.

In other words, in September, 1914, at the time this agreement was made, I think it could fairly be assumed that food stuffs, conditional contraband on neutral ships consigned to neutral ports would not be subject to seizure. But if they were enemy owned, they would.

Our opponents take the position that Crossman & Sielcken were agents which would postulate the fact that these goods were enemy owned at the time they were bought. I say that nobody in his senses would have

made that agreement in Germany at that time and that the parties could not have understood it so.

Nor did they make that agreement because, if you will read the language there, you will see that all they said was that they were to receive these goods at Baltic seaports.

It is true that they said that they would pay for the cargoes c. i. f. and "c. i. f." ordinarily means that title passes on delivery to steamer. Yet the term "c. i. f." is used here with a different signification. Here those initials are used merely to indicate the bill on which payment is to be made and on which commission is to be 2384 paid.

But there is something still more significant in this instrument which shows that it means what I say and that Crossman & Sielcken were not agents and that this was not any contract. If your Honor will look at the last paragraph you will find that it reads:

"The confirmation can be cancelled by us at any time and expires of itself on the proclamation of peace. Cargoes which are on their way are in such cases still to be received and also goods which have been contracted for shipment as well as goods which have previously been purchased and ordered for the purposes of this contract." 2385

If Crossman & Sielcken had been agents, of course that paragraph would not have been in there. They obviously would have been entitled to payment.

If you will take the clause "Cargoes which are on their way are in such cases still to be received," it is obvious that the cargoes were not to be paid for under ordinary circumstances until they were to be received because otherwise there would have been no reason for that clause in this contract.

Not only is this notification very clear that the Reichseinkauf was to pay for nothing except for cargoes that were received at Baltic seaports and not only is that the probability of the situation and obviously the way these parties would have framed their transaction, but on every bill of lading appears a statement that Crossman & Sielcken are the owners of the goods.

Not only that, but their insurance certificates say that there is no enemy interest in the goods.

It is admitted that in shipping the goods, the central purchasing agency advised Crossman & Sielcken to put that stamp upon the invoices and upon the bills of lading and it was necessary to put that stamp on or the goods would not have gone through.

But according to our contention, that stamp actually represented the facts as they existed. Crossman & Sielcken were the owners of the goods and there was no enemy interest in the goods and there would not be until those
2387 goods were purchased at Baltic seaports.

In other words, these affidavits actually represented the facts. It can hardly be assumed in court that Crossman & Sielcken made a false affidavit merely because they were asked to do it.

The Court: In what connection were those affidavits made?

Mr. Hays: On the bills of lading.

Another very interesting point that answers the agency argument seems to me to be this: It is obvious that under this notification, if Crossman & Sielcken had bought cargoes in the United States and had shipped them to Baltic
2388 seaports, they could have sold those cargoes in Baltic seaports to anybody they chose. They were not bound by this notification. The central purchasing agency agreed to pay a certain amount at Baltic seaports but Crossman & Sielcken never said that "All cargoes we buy will be bought for your account."

If Crossman & Sielcken had the right to buy any amount of food stuffs than they desired and if they had the right to ship those cargoes to anybody, obviously they were not the agents of the Reichseinkauf.

The Court: How were the bills of lading drawn? Were they drawn to the order of Crossman & Sielcken?

Mr. Hays: Or to the consignees who were named.

Summing up my argument, it is obvious that this was not an agency because Crossman & Sielcken could have sold to anybody in Baltic seaports.

The Court: I do not quite follow you. You say that the bills of lading were drawn to the order of consignees;

that is at the time of shipment the bills of lading designated to whom the delivery was to be made. You say notwithstanding that, that after shipment, Crossman & Sielcken were in such control that they could have transferred ownership?

Mr. Hays: Yes, sir, until the goods arrived, because they had not obligated themselves to do anything. The Reichseinkauf merely agreed to accept those cargoes in Baltic seaports.

In addition to this evidence, it appears from the notification itself, from the bills of lading, and from the invoices that the relationship of principal and agent did not 2390
exist. And then there is also a deposition of one named Frisch who handled these transactions with Sielcken. Frisch was connected with the central purchasing agency and his evidence seems to us to make it clear that it was understood that the risk of loss was to be on Crossman & Sielcken in the event that these goods were seized.

That is our main defense, that under this notification, there was no obligation on Z. E. G., and that the facts show an express agreement that Crossman & Sielcken should take the risk of the voyage.

Our next defense is this: Mr. Sielcken died on October, 1917. He had been in Germany from the outbreak of the 2391
war and on the outbreak of the war, he became an enemy alien. Although he was a naturalized American citizen, he was an enemy alien. On the outbreak of the war, the firm of Crossman & Sielcken was dissolved by the outbreak of the war.

The Court: There was no express dissolution was there? You mean as a matter of law, it was dissolved?

Mr. Hays: Yes, sir.

So in 1917, the situation was that Hermann Sielcken was in Germany and the firm was dissolved.

We claim that Mr. Sielcken had a right to collect whatever assets there were in Germany including any claims against Z. E. G. or the German Government just as the American partners would have a right to collect claims here. Any partner would have a right to collect debts.

He died in 1917, in October. After his death, his ex-

ecutors in Germany agreed to submit this claim against Z. E. G. to arbitration. On arbitration, the Tribunal found that Crossman & Sielcken had no claim.

The Court: Was that done on notice to the American partners?

Mr. Hays: It was done during the war. It was in 1918. So the question is whether the partner residing in Germany had a right to collect assets, whether he had a right to submit his claim to arbitration; and then the question arises whether if he had that right, his executors would have the same right.

2393 As I say, the Tribunal decided that the risk of loss was on Crossman & Sielcken and that there was no claim against Z. E. G.

The Court: Was that a sort of a declaratory judgment?

Mr. Hays: There was an agreement between the executors and Z. E. G., that the matter should be submitted to arbitration. We have the arbitration agreement here and the opinion of the arbitrators.

The Court: What did they arbitrate?

Mr. Hays: The question as to whether the Z. E. G. was liable.

2394 The Court: The same issue as is here?

Mr. Hays: Yes. And they decided against Crossman & Sielcken.

I should say the main question as to that would be whether the executors had the right to arbitrate the claims of the partners over here. I say they did have a right because on the dissolution of the partnership, Hermann Sielcken succeeded to that claim and his executors, after his death, succeeded to the claim and in time of war they had a right to collect any assets in Germany, and this was one of their assets.

If that were not so, how in the world would anybody in time of war be able to proceed on a claim in Germany even though he were there at the time?

Here is a partner in Germany. If he had a right to proceed and his executors had a right to proceed, they

had a right to leave these things to arbitration and all parties are bound by the decision of the arbitrators.

Further than that, Hermann Sielcken owned all the capital of Crossman & Sielcken. The other men were junior partners who had an interest in the profits. Hermann Sielcken owning all the capital, we claim he had a right over there to settle this thing with the German government and his executors had a right to leave it to arbitration.

The Court: Would ownership of all the capital make any difference to the plaintiffs here, if they were partners? 2396

Mr. Hays: I think it would, because a question might arise as to whether Hermann Sielcken who was in Germany, had a right to collect debts unless his interest in the firm was sufficient to make certain that the money did belong to him.

Further than that, we claim that after the arbitration by agreement between the executors and the Zentral Einkaufs Gesellschaft, the whole thing was settled somewhat different from the decision of the arbitrators. Under the decision of the arbitrators, 1/13th of the case was won by the Sielcken Executors and 12/13ths by the Zentral Einkaufs Gesellschaft. There was some issue about $30,000. 2397
The costs were to be borne in that proportion. After the determination of that arbitration, which left one question open, the executors arranged with the Z. E. G., that instead of the executors paying 12/13ths of the cost of the arbitration, they should pay 3/4ths of the cost and the Z. E. G. should pay 1/4th of the cost.

It was further agreed that Crossman & Sielcken might retain $31,000 which had theretofore been paid them on account of a shipment on the Steamship "United States." The $31,000 was retained by Crossman & Sielcken and is retained by Crossman & Sielcken up to this day so far as we know.

Only 3/4ths of the cost of the arbitration was paid by the Sielcken Estate instead of 12/13ths.

The Court: I did not quite understand that.

Mr. Hays: I say the Arbitration Tribunal left certain questions open. There were further questions under their

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decision that were to be determined according to the law of Denmark.

12/13ths of the cost of the arbitration was to be paid by the Sielcken estate and 1/13th by the Z. E. G. Then the Sielcken Estate arranged with Z. E. G. to settle it on this basis: The German Executors would pay 3/4ths of the cost of the arbitration and Z. E. G., 1/4th.

They further agreed that Crossman & Sielcken should retain $31,000 that had theretofore been paid Crossman & Sielcken on account of one shipment on the steamship "United States," which is not in issue here.

2399 In other words, even though those goods did not arrive, Crossman & Sielcken were paid $31,000 for them and Z. E. G. claimed the right to the return of that $31,000. It was agreed that Crossman & Sielcken should retain the $31,000. And we contend that Crossman & Sielcken or the Sielcken estate received a benefit by that settlement.

Our further point is that that settlement has been ratified. The arbitration took place in 1918. In 1919, one of the members of this firm was in Germany discussing the question of this arbitration. In 1920, letters passed between one of the members of this firm now bringing suit and Theodor Wille who was associated with Crossman &

2400 Sielcken in these transactions and Crossman & Sielcken were notified by letter that this whole thing had been settled and they confirmed receipt of that letter. That was in 1920.

Further acts of ratification we claim on the part of the plaintiffs, here occurred in 1924, when the plaintiffs filed a claim against the Central Purchasing Agency with the Mixed Claims Commission at Washington.

When Theodor Wille of Hamburg, who was the associate of the plaintiffs in these transactions—as I shall state later, there was a joint account—heard of that, he cabled over here. Crossman & Sielcken withdrew the claim. It was some three or four years later that they refiled the claim and that this suit was started.

So we claim that those acts constitute a ratification of the determination of the Tribunal and the subsequent agreement that occurred in Germany.

Those are our main defenses.

We also claim this: Crossman & Sielcken had a joint account with Theodor Wille in these shipments, Theodor Wille being in Hamburg. When these ships were seized and the loss was ascertained half of the loss was immediately charged against Wille. So our claim is, that the plaintiffs have only been damaged 50% because that was the extent of their interest.

We further claim that Wille should be a party to these proceedings.

I may say as to those last defenses, your Honor, that 2402
I am not at all sure of my law. If that were a situation where they were to account to Wille for half the profits and to charge Wille with half the losses, I am inclined to believe in all fairness that they would have a right to bring this suit themselves, even though they afterwards had to account. So, while I am presenting those defenses, I am not arguing them strenuously because I am inclined to think I may be wrong. If I find I am right and there is any case on appeal, I want to take advantage of those defenses.

The Court: Have you set them up in your answer?

Mr. Hays: Yes.

The Court: The absence of a necessary party? 2403

Mr. Hays: Yes, sir. But I am not sure enough of that point to make a strong argument here. I also have set up that this case is governed by German Law, the notification having been given in Germany, and that under the German law the risk of loss is on the shipper. I am not going to put in evidence of the German law because I am ready to rely upon the law here and I think my opponents also are. I realize that if we were to put in such evidence, I would have experts testifying in one way and they would have experts testifying in the other way and nothing would come of it so far as those defenses are concerned. So I am not going to press them here.

In substance our position is that this notification, Exhibit A, involved no obligation on Z. E. G., that there are many things that show that the risk of loss was on Crossman & Sielcken, such as the statements on the bills of

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lading that the matter was arbitrated, thereafter settled, and the settlement was ratified by the plaintiffs.

Opening statement of Mr. Rhodes.

Mr. Rhodes: May it please the Court, I represent the Alien Property Custodian.

As stated by Mr. Barnes, the position of the Government is in a large measure that of a stakeholder in that Congress has already provided for the disposition of all
2405 seized property. They have provided for the return of 100% of all seized property except that of Germany, enemy nationals; they get 80% and 20% is transferred to a special deposit account in the Treasury and is used in part in the payment of the awards of the Mixed Claims Commission in favor of the American Nationals who have claims against the German Government.

Section 25D of the Settlement of War Claims Act enacted March 10, 1928, 45 Stat. 254, and known as the "Settlement of War Claims Act"—

The Court: What is the citation?

Mr. Rhodes: 45 Stat. 254.

The Court: Have you got the reference to the Code?

2406 Mr. Rhodes: It is not in the Code. It was enacted after the Code.

The Court: But it ought to be in one of the supplements.

Mr. Rhodes: That is probably true, but I have not looked that up.

The Court: All right, I shall find it.

Mr. Rhodes: That provides that the property of the German Government seized by the Alien Property Custodian should be used in the payment of debts found to be due which were payable under the Trading with the Enemy Act and that the balance left, should be transferred to the special deposit account, not 20%, but 100% of the property of the German Government.

So the money here seized was seized in the name of the Zentraleinkaufs-Gesellschaft, a German corporation or partnership or association—I do not know just what its legal entity was—which was the successor of the Reichs-

einkauf, the purchasing agency of the German government. That is all stipulated and agreed to by all of the parties concerned.

The Alien Property Custodian in his answer has admitted that the plaintiffs filed a claim as required by the statute, have complied with the provisions of the Trading with the Enemy Act in that they must first file a claim before they bring a suit; he has admitted in his answer that he holds more than sufficient funds to satisfy any judgment that might be entered by this Court in this case.

However, in the answer of the Alien Property Custo- 2408
dian, he sets up as an affirmative defense, the fact that a suit has been filed in the Supreme Court of the District of Columbia by one Securities Corporation General to recover $250,000 with interest. That suit went to a final decree.

I should state that that suit was by a bondholder of the German Government who sued the Alien Property Custodian to recover the amount of the bond with interest out of funds of the German Government held by the Alien Property Custodian.

A final decree was entered in that case in favor of the plaintiff, the Securities Corporation General. An appeal was prosecuted by the Attorney General to the Court of 2409
Appeals of the District of Columbia which affirmed the decree of the Trial Court and then the Supreme Court of the United States affirmed the decrees below.

That decree has not yet been satisfied in its entirety for the reason that the funds held by the Alien Property Custodian to the credit of the Imperial German Government are really held in the name of the Zentraleinkaufs-Gesellschaft.

You see the Zentraleinkaufs-Gesellschaft funds are in fact the property of the German Government. The Zentraleinkaufs-Gesellschaft is an agency or instrumentality of the German Government. The Custodian does not hold the funds in the name of the German Government, but holds them in the name of the Zentraleinkaufs-Gesellschaft because these corporations here in New York who

reported the money to the Custodian reported it as belonging to the Zentraleinkaufs-Gesellschaft. He seized other money in the name of the Imperial German Government. That money was exhausted before this decree was completely satisfied, this decree of the Supreme Court of the District of Columbia.

Therefore, I wish to introduce in evidence the final decree of the Supreme Court of the District of Columbia which was filed on June 19, 1924, for $250,000 with interest in favor of the Securities Corporation General and also the decree of the Court of Appeals—

2411 The Court: We have not gotten to the evidence yet. I just want to hear your contentions.

Mr. Rhodes: As I understand it, there was no further evidence to be presented.

The Court: They have not started the trial yet. This is merely their opening.

Mr. Rhodes: All right, your Honor.

I may state that I have collaborated with counsel for the Zentraleinkaufs-Gesellschaft. We are both defendants and we are both trying to protect the fund so far as is right.

I concur in the legal position of Mr. Hays which it is

2412 unnecessary for me to go into.

That is the position of the Government.

The Court: Mr. Rhodes, may I ask a question? As I understood you, the decree in the Securities Corporation General's suit is not yet in final form. Was some appeal pending or something of that kind?

Mr. Rhodes: No, your Honor. The decree in that case was affirmed by the Supreme Court of the United States and the funds held in the name of the German Government by the Alien Property Custodian have been exhausted, but there is still some more due.

The Court: And therefore you may have to resort to this fund?

Mr. Rhodes: My position is that those decrees down there in the Supreme Court of the District of Columbia will have to be satisfied first.

The Court: After the satisfaction of the unpaid balance of that decree out of this particular fund, would there remain enough to satisfy a decree in the case at bar if there is a recovery?

Mr. Rhodes: There may not.

The Court: Manifestly then the Alien Property Custodian and the Treasurer should be taken care of by a proper decree.

Mr. Rhodes: That is my position.

The Court: I suppose there will be no dispute about that?

2414

Mr. Barnes: Of course the Custodian and the Treasurer must not be directed by two Courts to pay out more money than they have. That would not do at all.

I have no doubt that when we come to that point, if your Honor decides that we are entitled to this money, we can settle the matter without any difficulty.

Mr. Rhodes: I just want to introduce this in evidence as a matter of protection. A final accounting may disclose that there is enough to satisfy a decree here.

As I understand it, Section 9A of the Trading with the Enemy Act, as amended on March 4, 1923, 42 Stat. 1511, is the section and the only section under which this suit is brought. That provides that any person not an 2415
enemy or an ally of an enemy may bring a suit in the District Court of the United States for the district in which the plaintiff resides or in the Supreme Court of the District of Columbia against the Alien Property Custodian to recover a debt and that when such a suit is filed, the money shall be held until it is satisfied.

I think under that section the decrees in the District of Columbia have priority. That is the reason I wish to introduce these decrees in evidence.

The Court: You will be afforded the opportunity.

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Prima Facie Proofs.

JOHN S. SORENSON, called as a witness on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination by Mr. Barnes:

Q1. Mr. Sorenson, you are one of the plaintiffs in this action, are you not? A. I am.

Q2. Where do you reside? A. 757 Carroll Street, Brooklyn.

2417 Q3. What is your present business? A. Commission merchant, export and import.

Q4. What is the name of your firm? A. Sorenson & Co., Incorporated.

Q5. In 1914 and 1915, what was your business? A. Same business.

Q6. You were in the same business? A. Commission merchant, export and import.

Q7. Of what firm were you a member at that time? A. Crossman & Sielcken.

Q8. Who were the partners in Crossman & Sielcken? A. Hermann Sielcken, T. S. B. Nielsen and myself.

2418 By the Court:

Q9. Nielsen is the other plaintiff? A. Yes, sir.

By Mr. Barnes:

Q10. Is this paper I show you a photostatic copy of your partnership agreement (handing document to witness)? A. Yes, sir.

Mr. Barnes: I offer it in evidence.

(Marked Plaintiffs' Exhibit No. 1.)

The Court: What is the date of that, Mr. Barnes?

Mr. Barnes: June 2d, 1913.

The Court: Gentlemen, call my attention to any relevant parts of documents as you go along, because I want to have their contents clearly in mind.

Mr. Barnes: The only relevant parts in here are

that all of the capital of the partnership was contributed by Mr. Sielcken, and that the partners should be entitled to the following division of the partnership; to wit, 75 per cent of the net profits to Mr. Sielcken, 12 1/2 per cent to Mr. Sorenson and 12 1/2 per cent to Mr. Nielsen.

There is also the usual provision that the partnership should expire upon the death of the party of the first part, which is Mr. Sielcken, and it should be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital. 2420

The Court: Read that to me in precise terms.

Mr. Barnes (reading): "Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the Executor of the will of the deceased partner his capital as above defined, and also all the property and business of the firm."

By Mr. Barnes:

Q11. Mr. Sorenson, was Crossman & Sielcken a long established concern? A. Yes, sir, I went with them in March, 1883. 2421

Q12. What was the name of it at that time? A. W. H. Crossman & Brothers, later succeeded by Crossman & Sielcken.

Q13. They were succeeded by Crossman & Sielcken? A. Yes, sir.

Q14. Who were the members of the firm of Crossman & Sielcken? A. George W. Crossman and Hermann Sielcken.

Q15. In 1913, at the time the firm of which you became a member was organized, how large a business were you doing? A. We were doing a very large export business that approximated 6 millions to ten millions a year in exports, and imports of a similar volume. It was a very large business.

Q16. Did you have connections all over the world? A. We did.

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Q17. Did you have facilities for shipping space, etc.? A. As very large shippers for upwards of twenty-five years to all parts of the world, we were at particular advantage with all lines of shipping.

Q18. What was the citizenship of the three partners? A. All Americans.

Q19. Where did they reside?

Mr. Hays: I object, unless you specify the time. That calls for a conclusion.

Q20. Where did you live? Where did you yourself live?
2423 Where was your home? A. The same as today.

Q21. Where was that? A. Brooklyn.

Q22. And where was Mr. Nielsen's home? A. Hackensack, New Jersey.

The Court: What time are you speaking of?

Mr. Barnes: I am speaking of the period from 1913, the time of the organization of the new partnership, on.

Q23. Where was Mr. Sielcken's home?

Mr. Hayes: That I object to as calling for a conclusion. I think the witness should be asked where
2424 Mr. Sielcken was at certain times, whether he had an apartment here, or something like that.

Q24. Where did Mr. Sielcken spend most of his time between 1913, the date of the organization of the firm, and the time that he went to Germany in the summer of 1914? A. In New York.

Q25. Did he have an apartment here? A. For many years and up until the time of his death, he had a suite at the Waldorf Astoria, continuously.

Q26. That is, he had it all the year around? A. Yes, sir.

Q27. He also had a place in Germany? A. Yes.

Q28. A summer home? A. Yes, sir.

Q29. Where was that? A. At Baden-Baden.

Mr. Hays: Did you say a summer home?

Q30. Have you ever been there? A. I have not.

Mr. Barnes: Then I shall strike out the words "summer home."

Q31. He had a residence at Baden-Baden? A. Yes.
Q32. That is, he had a house? A. Yes.
Q33. Do you know where he voted? A. In New York.

Mr. Hays: Wait a moment, I should like to make sure whether that is not hearsay. I do not suppose the witness knows anything about it himself.

The Witness: I was never present when Mr. Sielcken 2426
voted, but he was a resident of New York, and as such I always understood that he voted in New York.

Mr. Hays: I move to strike that out.

By the Court:

Q34. Do you know whether he voted in New York? A. I can not say.

The Court: Then strike it out.

By Mr. Barnes:

Q35. Where was the place of business of Crossman & Sielcken in New York City? A. It was at 90 Wall Street, 2427
from 1913 to 1917.
Q36. Was that your only office? A. Our only office.
Q37. What was the division of activities between you three partners? A. Mr. Sielcken specialized particularly in the coffee affairs of the partnership. Mr. Nielsen handled the import end of our activities. Mine were the exporting business, the accounting and the financing.
Q38. Subsequent to the outbreak of the war between the Central Powers and the Allies in the summer of 1914, Mr. Sorenson, did you receive communications from Hermann Sielcken? A. Yes.
Q39. Where was he at the time the war broke out? A. He was in Germany.
Q40. He was in Germany? A. Yes.
Q41. Were these communications with respect to the

purchase and shipment of food supplies to Baltic ports? A. Yes.

Q42. What form did these communications take?

Mr. Hayes: I object to any communications unless they are connected with the defendant.

The Court: I shall overrule your objection. This is preliminary to something. He has not come to anything definite yet—

A. The communications were sent to us in the form of
2429 letters, cables, radio messages, and by word of mouth through messengers.

Q43. Were these letters and telegrams preserved? A. I do not know whether they were. I did not preserve them.

Q44. As a result of these communications, what did you do with respect to shipping cargoes of food stuffs? A. My partner and myself directed the export departments to select such food stuffs as we thought were wanted, pay for them, engage freight room, ship them, and forward the documents to the consignees that we were directed to consign them to.

Q45. From whom did you receive instructions as to the nature of the cargoes, as to what was to be in the cargoes?
2430 A. From Mr. Sielcken.

Q46. From whom did you receive instructions as to the names of the consignees? A. Mr. Sielcken.

Q47. All in this same way? A. Yes, sir.

Q48. From whom did you receive instructions as to the issuance of the bills of lading? A. Mr. Sielcken.

Q49. And as to the insurance? A. Mr. Sielcken.

Q50. And as to forwarding the papers? A. Mr. Sielcken.

Q51. And as to the forms of the invoices to accompany the documents? A. Mr. Sielcken.

Q52. In other words, all of your instructions with respect to doing this business came in the manner that you have indicated, from Mr. Sielcken? A. Entirely, sir.

Q53. And he was abroad at that time? A. Yes.

Q54. You followed those instructions? A. Yes, sir.

Q55. As to this merchandise that was shipped, by whom was that paid for? A. We paid for it.

Q56. Out of your own money? A. Out of our capital.

Q57. By whom was the freight and the insurance on these cargoes paid? A. In the same manner. We paid for that.

Q58. Did you from time to time receive remittances in New York from abroad covering the invoice value and the freight and the insurance and a 10 per cent commission on these shipments? A. The exact amount each time plus 10%, yes.

2432

Q59. Roughly speaking, about how many shipments in all were made? A. Roughly, 20 to 25 shipments.

Q60. Beginning about what month? A. October, 1914.

Q61. October, 1914? A. Yes, sir.

By the Court:

Q62. 20 to 30 shipments? A. 20 to 25 shipments altogether.

By Mr. Barnes:

Q63. I am correct, am I not, that on the first of these shipments they all went through all right and you received your remittances in due course shortly after the goods arrived? A. Yes.

2433

Q64. Coming down to the shipments made to Harry Levin of Copenhagen, when did those shipments to Harry Levin of Copenhagen begin? A. May I refer to my papers?

Q65. Yes. A. (Witness consults documents) They began at the end of November, 1914.

Q66. Previous to making those shipments at the end of November, 1914, had your firm ever had any business relations or dealings with Harry Levin? A. Never.

Q67. Did you know anything about him? A. No.

Q68. Tell us about how many cargoes were shipped in November, 1914, to Harry Levin? A. Two cargoes.

Q69. And how many in December, 1914 to the same person? A. Two.

Q70. And how many in January, 1915? A. Two.

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Q71. Were these cargoes all shipped in the same manner, that is with respect to forwarding the documents, etc.? A. Yes, exactly the same.

Q72. Did you afterwards receive payment for these cargoes? A. Yes, sir.

Q73. And the amount of payment covered the invoice value and the freight and the insurance and a commission of 10%; is that right? A. Yes, sir.

Q74. Were there some shipments between February 27th, 1915, and April 13th, 1915 made to Harry Levin? A.
2435 Yes, there were.

Q75. How many of those were there? A. There were four shipments not paid for.

Q76. I did not ask you how many were paid for. How many shipments were made? A. Five.

Q77. Five shipments were made? A. Five shipments.

Q78. Were those five shipments intercepted by the British? A. Yes.

Q79. That was your information? A. Yes.

The Court: All of them.

Mr. Barnes: All five were intercepted.

Q80. What were the names of the vessels and the dates
2436 of the sailing of those five shipments? A. March 9th, 1915 the Hilding, $95,578.29. March 11th, 1915 United States, $28,776.73.

Q81. Are those figures which you are giving the invoice figures? A. I am giving you the sailing dates.

Q82. And the invoice values? A. And the invoice values, yes.

Q83. Not the 10% commission? A. No.

Q84. What is the next one? A. March 25th, the Arkansas, $48,686.81.

Q85. And the next one? A. April 1st, the Helig-Olav, $28,105.99. April 15th, the Gunborg, $43,997.16.

Q86. I understand that all five of those boats were intercepted by the British, is that right? A. Yes.

Q87. Were you paid for any of those shipments? A. We were paid for the second one.

Q88. Which one was that? A. The United States which sailed March 11th, plus ten per cent.

Q89. How much were you paid, do you remember? A. $31,654.40.

Q90. When was that paid? A. On the 12th of April in New York.

Q91. 1915? A. 1915.

Q92. And that amount covered the invoice value, freight, insurance, and ten per cent commission? A. Yes.

Q93. But as to the other four vessels you have never been paid? A. Never been paid.

2438

Q94. There were also, were there not, two shipments consigned to Messrs. Beckmann & Jorgensen during this period? A. Yes.

Q95. Previous to those shipments had your firm ever known of Beckmann & Jorgensen, or done any business with them? A. No, sir.

Q96. What were the names of the vessels and the dates of sailing of those two shipments? A. April 27th, Indianic, $53,471.31. April 29th, Oscar II, $83,625.87.

Q97. These two shipments were also intercepted by the British, were they not? A. Yes.

Q98. Were you ever paid anything for those shipments made to Beckmann & Jorgensen? A. We received $8,-

2439

050.44 on the Oscar II shipment.

Q99. Do you know what that payment represented? A. It represented some cereals. We were advised that they were not returned to England, having been landed at Copenhagen.

Q100. What was the total amount of the invoices, freight, insurance and commission on these six shipments, four to Harry Levin and two to Beckmann & Jorgensen, that you have testified to? A. With the commission included?

Q101. Including the commission of 10%? A. $388,-811.98.

By the Court:

Q102. That is the total of all of them? A. Yes.

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By Mr. Barnes:

Q103. And crediting on that the payment on the cereals on the Oscar II of $8,050.44, what is the balance? A. That leaves a balance due of $380,761.54.

Q104. That is the amount of this claim in litigation? A. Yes, sir.

Mr. Barnes: You may examine, Mr. Hays.

Cross Examination by Mr. Hays:

2441

XQ105. Do you know when in 1914, Mr. Sielcken went to Germany? A. Do I know when?

XQ106. When in 1914? A. It was late in May or early in June.

XQ107. He had a home in Germany? A. Yes.

XQ108. Where? A. At Baden-Baden.

XQ109. A large estate? A. I understood it to be a large estate, yes.

XQ110. You never visited there? A. I never did. My partner did.

XQ111. Mr. Sielcken after that was continuously in Germany until his death, was he not? A. He was.

2442 XQ112. You knew, did you not, Mr. Sorenson, that sometime in 1918, there was an arbitration in Germany between the executors of the Sielcken estate and the Zentraleinkaufsgesellschaft referring to the question of the loss on these cargoes? A. Do I know?

XQ113. You knew that, did you not? A. I did not.

XQ114. When did you first hear it? A. I have heard nothing definite in that connection at any time.

XQ115. You have not? A. No, sir.

XQ116. What do you mean by "definite"? Did you hear anything indefinite? A. Details.

XQ117. In general what did you know? When did you first learn about it?

Mr. Barnes: If the Court please, I object to going into this upon cross examination of this witness. This is a part of the defendants' case.

The Court: I shall receive it. Let us get through with it. I am not a jury.

Mr. Barnes: That is quite true. But we contend that the liquidating partners here were never in any way bound by this arbitration agreement entered into in Germany at a time when the two nations were at war undertaking to settle the rights of Crossman & Sielcken over here as against the German Governmental Agency in Germany.

The Court: Practically all that Mr. Hays is asking whether this witness had any knowledge of 2444
it.

XQ118. When did you first have some knowledge, direct or indirect, definite or indefinite? When did you first hear about it? A. I may have heard within the last year.

XQ119. Do you mean to say you did not hear of it in 1919 or 1920? A. I may have heard something in an offhand manner.

XQ120. Let me refresh your recollection. I show you here what purports to be a copy of a letter from Theodor Wille, dated March 23rd, 1920, in which he says, "Of course a serious conflict arose as to whether the intended consignees had to pay or not for those cargoes 2445
which arrived in Copenhagen under the above circumstances. The parties interested came to an agreement that the question should be settled by arbitration, and the result of the arbitration was that the intended consignees were not obliged to pay, not even for those cargoes which had arrived at Copenhagen as above, with the exception of one cargo per S. S. United States which had already been paid for. In this way you will understand that the amounts of your invoices per ships Arkansas, Hellig Olav, Oscar II have also been lost." Do you remember a letter from Mr. Wille in 1920? A. May I ask you to whom that letter is addressed?

XQ121. To Crossman & Sielcken? A. In New York.

XQ122. Yes, and then there is an answer under date of May 21st, 1920, from Crossman & Sielcken, which says: "In this connection we note from your favor of

March 29th that it has been determined by arbitration that there will be no recovery from the eventual buyers for those cargoes which reached Copenhagen on steamers that have been taken into British ports and allowed to proceed to Copenhagen under guaranty to return cargoes to England. Yours very truly, Crossman & Sielcken."

The Court: I shall not admit in evidence what counsel is reading into the record as any proof whatever. All that I permit is that you refer to those documents and see whether they refresh
2447 his recollection.

By the Court:

XQ123. Does that refresh your recollection any— A. No.

Mr. Hays: We stipulated that those letters were interchanged.

By Mr. Hays:

XQ124. Mr. Sorenson, take a look at these letters which counsel stipulated passed at the time. There is one from Wille to Crossman & Sielcken (handing document
2448 to witness). A. My partner handled all of that.

XQ125. Look over those letters and see if they refresh your recollection.

(Discussion.)

Mr. Hays: I withdraw the question.

Mr. Barnes: We stipulated that the letters were interchanged.

XQ126. I am interested to know about it. Do you recall that? A. Yes, the correspondence passed. Nielsen handled it and signed it.

XQ127. You refer to payment having been made on the Steamship United States. Do you know whether or not at the time the payment was made by the Z. E. G. for the goods on the United States which had been seized amounting to some $31,000 that both Mr. Sielcken and the

Z. E. G. thought that those goods would be released? Do you know that? A. I do not know.

~~XQ128. Did you not ever hear that? A. I did not.~~

XQ128. Did you not ever hear of that? A. I did not.

or to Mr. Nielsen's attention in your office? A. It would have come to Mr. Nielsen's attention.

[XQ129. Would that matter have come to your atten

Mr. Barnes: If your Honor please, practically the rest of our evidence is covered by stipulation.

2450

The Court: Is there anything you wanted to mark in evidence?

Mr. Barnes: These papers are written in German with translations attached. I would like to offer them and to read such portions of them as I think will enlighten your Honor unless your Honor prefers to take time and study them at your leisure.

The Court: No. You had better tell me what is in them. If there is any controversy I shall look at them. Are there any that you want marked?

Mr. Barnes: Yes, they will all be marked.

(Discussion.)

Mr. Barnes: Suppose I offer these, and have them marked.

2451

I offer in evidence Annex A to a stipulation filed in this case on June 1st, 1929, together with the translation thereto attached.

(Marked Plaintiffs' Exhibit No. 2.)

Mr. Hays: We do not concede that the translation is accurate in all respects.

Mr. Barnes: That is understood.

Mr. Hays: I understand Mr. Barnes is introducing them as his translations.

Mr. Barnes: The translation there is identical with that which is set up in the defendants' answer as the contract between the parties.

Mr. Hays: We found in the last day or two that

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there were one or two errors in it, and we want to correct them.

Mr. Barnes: I offer in evidence Annex B to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 3.)

The Court: Have you anything else?

Mr. Barnes: It is further stipulated in this stipu-
2453 lation that in January, 1915, the defendant, Zentral Einkaufs Gesellschaft, m.b.H., took over the business, assets and liabilities of the Reichsenkauf and as such successor became the Purchasing Agency of the Imperial German Government as alleged in paragraph No. 5 of the bill of complaint.

With respect to Plaintiffs' Exhibit No. 2, which has just been offered in evidence, it is stipulated by this same stipulation of June 1st, 1929, that a certain letter signed by the Under Secretary of State of the German Empire, Dr. Richter, bearing date of September 25th, 1914, a copy of which is hereto annexed and made a part hereof as Annex
2454 A, is a true, complete and correct copy of a confirmation of the agreement made by the Reichsenkauf with Crossman & Sielcken as alleged in paragraph No. 7 of the bill of complaint.

The Court: Mr. Hays, that is the same document that is annexed to your answer?

Mr. Hays: Yes, sir.

The Court: Then the effect of this stipulation is to make that a contract?

Mr. Hays: No, I think at the end there is a statement that we stipulate that these are the papers, but we do not stipulate the interpretation of them.

The Court: I understand that, but you stipulate it is an agreement between the parties.

Mr. Hays: I thought you intimated that perhaps I was bound by the translation.

The Court: Oh, no.

(Discussion.)

Mr. Barnes: Now, I offer in evidence Annex C attached to said stipulation together with the English translation thereof.

(Marked Plaintiffs' Exhibit No. 4.)

Mr. Barnes: I now offer in evidence Annex D attached to the same stipulation, together with the English translation thereof.

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The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 5.)

Mr. Barnes: I now offer in evidence Annex E attached to the same stipulation, together with the English translation also thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 6.)

Mr. Barnes: I now offer in evidence Annex F attached to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection? 2457

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 7.)

Mr. Barnes: I now offer in evidence Annex G attached to the same stipulation, together with the English translation thereto attached.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 8.)

Mr. Barnes: I now offer in evidence Exhibit H attached to the same stipulation, together with the enclosures also attached and the English translation.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 9.)

Mr. Barnes: I also offer in evidence Exhibit 2 from the Memorial for Claim of the United States

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against Germany and Z.E.G., Docket No. 8305, together with a translation thereof.

The Court: Memorial by whom?

Mr. Barnes: Memorial by the United States of America and Crossman & Sielcken against Germany and Z.E.G.

The Court: Before the Mixed Claims Commission?

Mr. Barnes: Yes.

The Court: Is there any objection?

2459 Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 10.)

Mr. Barnes: Does your Honor want me to read from these exhibits at this time?

The Court: You can suit yourself about that.

Mr. Barnes: I think I should like to read from them now.

(Mr. Barnes then read Plaintiffs' Exhibits 2 to 10, inclusive, to the Court.)

Mr. Barnes: I shall now read into the record a stipulation which has been entered into between the parties, dated December 20th, 1929:

2460 "It Is Hereby Stipulated and Agreed, by and between the plaintiffs and the defendant, Zentral Einkaufsgesellschaft, m.b.H., by their respective attorneys, as follows:

1. That shipments of merchandise consisting of pure lard, fatbacks, clear backs, near backs, short backs, cakes and cereals were made by the firm of Crossman & Sielcken, pursuant to the written notification dated September 25, 1914, marked Exhibit A and annexed to the answer of the defendant, Zentral-Einkaufsgesellschaft, m.b.H., from New York, on the vessels, on the dates and to the consignees stated below. Defendant, Zentral-Einkaufsgesellschaft, m.b.H., does not hereby stipulate that the translation of Exhibit A is accurate:

Vessel	Date of Sailing	Consignee
Hilding	February 27, 1915	Harry Levin, Copenhagen
Arkansas	March 23, 1915	Harry Levin, Copenhagen
Hellig Olav	March 30, 1915	Harry Levin, Copenhagen
Gunborg	April 13, 1915	Harry Levin, Copenhagen
Indianic	April 23, 1915	Beckmann & Jorgensen, Copenhagen 2462
Oscar II	April 28, 1915	Beckmann & Jorgensen, Copenhagen

2. That the invoice value, including freight and insurance upon the said merchandise so shipped and the amount of the commission, computed at 10%, and the total of such value plus commission, are as follows:

Vessel	Invoice Value	Commission	Total 2463
Hilding	$95,578.29	$9,557.83	$105,136.12
Arkansas	48,686.81	4,868.68	53,555.49
Hellig Olav	28,105.99	2,810.60	30,916.59
Gunborg	43,997.16	4,399.72	48,396.88
Indianic	53,471.31	5,347.13	58,818.44
Oscar II	83,625.87	8,362.59	91,988.46

3. That as to three of said shipments, the Arkansas, Hellig Olav and Oscar II, the respective vessels carrying the same were stopped on the high seas by the British Naval Authorities and were permitted to proceed to Copenhagen only on condition that the owners of said respective vessels agreed to forward to England the said shipments to be there proceeded against in the Prize Court as contraband. The respective vessels carrying such merchandise thereupon proceeded to Copen-

hagen but refused delivery thereof to the respective consignees, except as to certain crackers and cereals on the SS. Oscar II, and forwarded said shipments to England where they were proceeded against in the British Prize Court, condemned as contraband of war, and sold, and the proceeds thereof appropriated by the British Government. The respective dates of the arrival of said vessels in Copenhagen are as follows:

2465

Vessels	Arrived in Copenhagen
Arkansas	April 17, 1915
Hellig Olav	April 17, 1915
Oscar II	May 11, 1915

4. That as to the remaining three of said shipments, to wit, those on the said SS. Hilding, SS. Gunborg and SS. Indianic, the vessels carrying the same did not reach Copenhagen, but were detained on the high seas by the British Naval authorities and taken direct to a British port and proceeded against and condemned in the British Prize Court as contraband of war and sold and the proceeds
2466 thereof appropriated by the British Government. The normal duration of voyage of said three vessels from New York to Copenhagen would be twenty days.

5. That bills of lading covering such shipments were taken out by Crossman & Sielcken in the names of the consignees Harry Levin and Beckmann & Jorgensen, respectively, as above specified. That annexed hereto are the bills of lading, invoices and insurance certificates, or copies thereof, covering the shipments above specified. These were immediately forwarded by mail to the respective consignees. Just what was done by the consignees or defendant Z.E.G. with these original papers after learning of the seizures heretofore

described is not known, and no point is made by either party that any legal result shall be ascribed to the retention of or the return of the said documents by said consignees and the defendant Z.E.G.

6. That the books of original entry of the firm of Crossmann & Sielcken show that the said firm of Crossmann & Sielcken have received no payment on account of the said invoice value or commissions on any of said merchandise except only the sum of $8,050.44 for certain crackers and cereals released from the said merchandise carried on said 2468
SS. Oscar II, and that the total of said invoice value and commissions remaining unpaid if due is the amount of $380,761.54, exclusive of interest.

7. That a shipment of similar merchandise was made by the firm of Crossmann & Sielcken, on the SS. United States, sailing from New York March 9, 1915, consigned to Harry Levin, Copenhagen, of which the invoice value, including freight and insurance and commission computed at 10% amounted to the sum of $31,654.40; that copies of the bill of lading, insurance certificate and invoice are hereto annexed; that said vessel was stopped on the high 2469
seas by the British Naval authorities and was permitted to proceed to Copenhagen only on condition that the owner of said vessel agreed to forward to England the said shipment, to be there proceeded against as contraband. Said vessel thereupon proceeded to Copenhagen, arriving there on March 27, 1915, but refused delivery of said shipment to the consignee, and forwarded said shipment to England, where it was proceeded against in the British Prize Court, condemned as contraband of war, and sold, and the proceeds thereof appropriated by the British Government. On April 12, 1915, the defendant Z.E.G. paid Crossmann & Sielcken the sum of $31,654.40, being the invoice value, including freight and insurance, and

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10% commission on said seizure both parties agreed that the merchandise should remain in Scandinavia and be sold there, and that at the time of such payment both parties expected that the merchandise would be released, and that Z.E.G., after the release thereof could not be obtained, made a demand that said payment be returned.

8. That Hermann Sielcken was at all times between the dates hereinbefore mentioned an American citizen.

2471 Mr. Barnes: I now offer in evidence one of the bills of lading covering the shipment on the Hilding from Crossmann & Sielcken consigned to Harry Levin of Copenhagen. The date of the bill is the 27th of February, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 11.)

Mr. Barnes: There are four other bills of lading covering the same shipments made out in the same manner to the same consignee, and bearing the same date.

2472 The Court: Covering the same shipments?

Mr. Barnes: Shipments of different goods on the same boat.

I also offer in evidence a copy of the insurance certificate covering the merchandise shipped on the Steamship Hilding.

The Court: Any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 12.)

Mr. Barnes: There were three other insurance certificates in other companies of substantially the same form covering war risk, and also an insurance certificate covering marine risk.

The Court: Do you want to offer those in evidence?

Mr. Barnes: We shall put in one and stipulate

the others. There is no point made that we did not adequately insure the cargoes.

(Discussion.)

Mr. Barnes: It is stipulated that the insurance certificates which were forwarded with the bills of lading and the invoices were endorsed in blank by Crossmann & Sielcken to whom they originally ran.

Mr. Hays: As to the bills of lading and the insurance certificates which have not been put in evidence, it is stipulated that all of the bills of 2474
lading contain the affidavit of Sorenson which appears on the one in evidence and also contain the printed statement below the affidavit which appears on the bill of lading in evidence, and that all the insurance certificates are substantially the same as the one introduced in evidence, and that all of them contain the endorsement, "Warranted no German, Austrian, Russian or Turkish ownership, interest, consignee or destination."

Mr. Barnes: I also offer in evidence a photostatic copy of the invoice accompanying the shipment on the Hillding, dated February 27.

The Court: Is there any objection? 2475

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 13.)

Mr. Barnes: I now offer in evidence one of the two bills of lading covering the shipment on the Steamship Arkansas consigned to Harry Levin.

The Court: Any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 14.)

Mr. Barnes: There is another bill of lading covering other packages of this same shipment which is in the same form as the one offered in evidence, and contains an affidavit by Mr. Sorenson that the goods are the property of an American concern.

Mr. Hays: And also the same stamp.

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Mr. Barnes: It is in exactly the same form as the other.

I offer in evidence an insurance certificate covering this shipment on the Steamship Arkansas which appears to be an original, and endorsed on the back by Crossmann & Sielcken.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 15.)

Mr. Barnes: There was also an insurance cer-
2477 tificate covering marine insurance which I shall not put in. That was also endorsed by Crossmann & Sielcken.

I now offer in evidence the invoice covering the shipment to Harry Levin on the Arkansas dated March 23rd, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 16.)

Mr. Barnes: I offer in evidence a copy of the bill of lading covering the shipment to Harry Levin on the Steamship Heligoland.

The Court: Is there any objection?

2478 Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 17.)

Mr. Barnes: I also offer in evidence what appears to be an original certificate of insurance on said shipment in favor of Crossmann & Sielcken, dated April 1st, 1915, and endorsed in blank by Crossman & Sielcken on the back.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 18.)

Mr. Barnes: There was also a certificate for marine insurance on the said boat which it is not necessary to put in evidence, that also being endorsed in blank.

I offer in evidence a copy of the invoice on the Heligoland on the consignment to Harry Levin, dated March 30th, 1915.

(Marked Plaintiffs' Exhibit No. 19.)

Mr. Barnes: I now offer in evidence one of the bills of lading covering the shipment on the Steamship Gunborg consigned to Harry Levin, dated April 12th, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 20.)

Mr. Hays: It is stipulated that the other bills of lading for shipment on the same steamer are in the same form. 2480

Mr. Barnes: There were two other bills of lading for shipment on the same steamer, in the same form.

I now offer in evidence a copy of a certificate of insurance covering war risk on said shipment, made out to Crossmann & Sielcken. It is understood that the original thereof was endorsed in blank and forwarded with the papers.

Mr. Hays: That is agreed to.

Mr. Barnes: There is a stamp of warranty that there is no German or Austrian interest.

(Marked Plaintiffs' Exhibit No. 21.)

Mr. Barnes: There was also another certificate 2481 for war risk insurance taken out in another company in substantially the same form, and with the same warranty of no German or Austrian interest in the goods.

I also offer in evidence a copy of the invoice of the shipment on the Gunborg to Harry Levin, dated April 13, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 22.)

Mr. Barnes: I offer in evidence a copy of one of the bills of lading covering the shipment on the Steamship Indianic, consigned to Messrs. Beckmann & Jorgensen and dated April 23rd, 1915.

The Court: Is there any objection?

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Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 23.)

Mr. Barnes: There were three other bills of lading issued in connection with the same shipment, all of which are in the same form.

I offer in evidence a copy of a certificate of insurance covering war risk on the same shipment. It is stipulated that the original of the same was endorsed by Crossman & Sielcken and forwarded with the other papers.

2483 (Marked Plaintiffs' Exhibit No. 24.)

Mr. Barnes: There was also another certificate of war risk insurance covering the same shipment with the same clauses in it regarding the warranty of no German or Austrian interest, which it is not necessary to put in evidence.

I also offer in evidence a copy of the invoice of the shipment from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen, April 23rd, 1915. This invoice is somewhat different from the others in that it provides "For account and risk of Messrs. Beckmann & Jorgensen," whereas the others said for the account and risk of Messrs. Crossmann &

2484 Sielcken.

(Marked Plaintiffs' Exhibit No. 25.)

Mr. Barnes: I offer in evidence a copy of one of the bills of lading covering the shipment on the Oscar II from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen, dated April 2nd, 1915.

The Court: Is there any objection?

Mr. Hays: No objection.

(Marked Plaintiffs' Exhibit No. 26.)

Mr. Barnes: There were also two other bills of lading in similar form covering the same shipment made out in the same manner.

I offer in evidence a copy of certificate of war risk insurance covering said shipment on the Oscar II. It is stipulated that the original was endorsed

in blank by Crossmann & Sielcken and forwarded with the other papers.

(Marked Plaintiffs' Exhibit No. 27.)

Mr. Barnes: There were also two other certificates of insuranee covering war risk in the same form on the same shipment.

I offer in evidence a copy of the invoice from Crossmann & Sielcken to Messrs. Beckmann & Jorgensen covering the shipment on the Oscar II.

The Court: Is there any objection?

Mr. Hays: No objection. 2486

(Marked Plaintiffs' Exhibit No. 28.)

Mr. Barnes: Now, I offer in evidence a copy of the bill of lading of the shipment on the Steamship United States from Crossmann & Sielcken to Harry Levin, dated March 9th, 1915.

Mr. Hays: I object to that on the ground that it is incompetent, irrelevant and immaterial. That is not one of the shipments involved in this case.

Mr. Barnes: This is a shipment that was made under this same arrangement. It was seized by the British, but was actually paid for by the defendant Z.E.G., after its seizure by the British.

We offer this for the purpose of showing that 2487 the documents and everything in connection with it were identical with those of the shipments which they refused to pay for.

Mr. Hays: It is stipulated between us that at the time these goods were paid for it was expected by both Crossmann & Sielcken and by the Z.E.G. that the goods would be released. Therefore, they were paid for.

When the goods were not paid for, the Z.E.G. made a claim against Crossmann & Sielcken.

If that is so, how is this material?

The Court: I shall receive it. I shall not be misled by it.

(Marked Plaintiffs' Exhibit No. 29.)

Mr. Barnes: I also offer in evidence in connec-

tion with this same shipment on the Steamship United States a copy of a certificate of insurance covering war risk.

The Court: It will be received under the same conditions.

(Marked Plaintiffs' Exhibit No. 30.)

Mr. Hays: I should like to have my objection noted on the record, your Honor. I object to all these documents referring to the S. S. United States on the ground that they are irrelevant and immaterial, and not within the issues of this case.

2489

The Court: Objection overruled. You may have your exception. I shall state on the record that in receiving them I do not pass on their effect.

Mr. Rhodes: I should like to note on the record the same objection.

The Court: All right, and you may have an exception.

Mr. Barnes: I offer in evidence a copy of the invoice of the shipment on the Steamship United States to Harry Levin, dated March 9th, 1915.

Mr. Hays: The same objection.

The Court: The same ruling, and you may

2490

have an exception.

(Marked Plaintiffs' Exhibit No. 31.)

Mr. Barnes: It is stipulated that the books of original entry of the firm of Crossmann & Sielcken show that the amount remaining unpaid, if due, on these transactions is the sum of $380,761.54, exclusive of interest, which is the amount Mr. Sorenson testified to.

And it is stipulated with respect to the circumstances of the seizure of the Steamship United States that it arrived in Copenhagen on March 27th, 1915, but that the vessel refused delivery of the shipment to the consignee, and forwarded the shipment to England where it was proceeded against in the British Prize Court and condemned as contraband of war and sold. It arrived on

March 27th, 1915. It was sent to England, and there it was sold.

On April 12th, 1915, the defendant, Z.E.G. paid Crossmann & Sielcken the sum of $31,654.40, being the invoice value, including freight and insurance, and ten per cent commission on said shipment. It is stipulated and agreed, however, that after said seizure both parties agreed that the merchandise should remain in Scandinavia and be sold there, and that at the time of such payment both parties expected that the merchandise would be released, and that Z.E.G., after the release thereof could not be obtained, made a demand that said payment be returned. 2492

That is put in as a qualification of any legal inferences which we might argue should be drawn from the fact that they did pay for this shipment.

May the stipulation which I have read be marked in evidence?

(Marked Plaintiffs' Exhibit No. 32.)

Mr. Barnes: I wish to offer in evidence the Memorial for Claim of the United States of America on behalf of the Columbia Trust Company as executor of the Last Will and Testament of Hermann Sielcken, deceased, and John S. Sorenson and Thorlief S. B. Nielsen, surviving partners of the firm of Crossmann & Sielcken against Germany and Zentraleinkaufs-Gesellschaft, m.b.H., being Docket No. 8305, together with the answer of the German answer thereto. 2493

Mr. Hays: I object to that as irrelevant and immaterial. Obviously the claim must be a self-serving declaration. It cannot be evidence in any case. If Mr. Barnes means that there are admissions in the answer and he will need those admissions to prove some of his facts, I might not insist on objecting.

Mr. Barnes: I shall read the paragraphs in the claims.

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The Court: We shall mark the papers separately.

Mr. Rhodes: I object to them also, your Honor.

The Court: I shall not pass on the effect of them, but I shall allow them to go in evidence.

Mr. Hays: Exception.

Mr. Rhodes: Exception.

(Marked Plaintiffs' Exhibits Nos. 33 and 34.)

(Mr. Barnes read Plaintiffs' Exhibits Nos. 33 and 34 to the Court.)

2495 Mr. Barnes: I understand that Mr. Hays and the Government admit that the notice of claim was properly filed on behalf of the plaintiffs, as provided for in the Trading With the Enemy Act.

Mr. Rhodes: I contend that the Memorial and answer are immaterial, incompetent and irrelevant, and I object to them.

The Court: I shall overrule your objection, and you may have an exception.

Mr. Barnes: Plaintiff rests.

(Prima facie proofs closed.)

Mr. Hays: Defendant Z.E.G. moves to dismiss the plaintiffs' case on the ground that the plaintiff has not made out a cause of action.

2496 The Court: Overruled.

Mr. Hays: Exception.

Defendants' Proofs.

Mr. Rhodes: Your Honor, I wish to introduce in evidence the final decree of the Supreme Court of the District of Columbia in the case of Securities Corporation General vs. Frank White, Treasurer of the United States, and Thomas W. Miller, Alien Property Custodian, Equity No. 41-153, filed on June 19th, 1924.

Mr. Barnes: I object to its admission in evidence upon the ground that it appears on the face of the

decree that the decree in question is against funds and property of the Imperial German Government held by the Alien Property Custodian and the Treasurer as property of the Imperial German Government, and not in any way held as property of the defendant Z.E.G.

The Court: Objection overruled. You may have an exception. I shall admit it as Exhibit A. I shall not pass on the effect of it now.

(Marked Defendants' Exhibit A.)

2498 Mr. Rhodes: I wish to introduce in evidence a copy of the mandate of the Supreme Court of the United States, Case No. 425, confirming said decree of the Supreme Court of the District of Columbia, and which incorporates a copy of the decree of the Court of Appeals of the District of Columbia. That was filed on December 17th, 1925.

Mr. Barnes: We note the same objection.

The Court: Same ruling.

Mr. Barnes: Exception.

(Marked Defendants' Exhibit B.)

2499 Mr. Rhodes: I also offer in evidence a copy of the mandate of the Court of Appeals of the District of Columbia in the same case, which was filed in the Supreme Court of the District of Columbia on March 21st, 1925.

Mr. Barnes: We note the same objection.

The Court: Same ruling.

Mr. Barnes: Exception.

(Marked Defendants' Exhibit C.)

Mr. Rhodes: Your Honor, I wish to move that the bill of complaint be dismissed for the reason that the agreement on which these transactions are based shows clearly that the purchasing agency of the German Government had no authority to buy, except on the condition that title would pass upon delivery at a Baltic seaport. The subsequent correspondence confirms that.

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One document here dated March 22nd, 1915, refers to the fact that even prior to the time when this affidavit was put on these bills of lading to the effect that the goods were the property of Sorenson & Nielsen, the goods were the property of Crossmann & Sielcken.

It was the understanding between the parties all along that the goods were the property of Crossmann & Sielcken until there was a delivery at a Baltic seaport.

2501 There is no evidence introduced here to show that the party who made the agreement on behalf of the German Government or the Reichseinkauf, the purchasing agency of the German Government, had authority to make such a contract.

The contract itself says that he is commissioned to receive in Baltic seaports, not to purchase in New York, but to receive in Baltic seaports.

I believe that the evidence in this case supports and confirms the fact that the title to these goods did not pass, and there was no understanding that it should pass until there was an actual

2502 delivery at a Baltic seaport.

There being no delivery at a Baltic seaport, the title never passed.

Consequently, there is no liability on the part of the Zentral Einkaufs-Gesellschaft as successor to the original contractor, the Reichseinkauf.

I move that the bill of complaint be dismissed because of the insufficiency of the evidence.

The Court: Motion denied. You may have your exception.

Proceed.

Mr. Hays: I should like to call Mr. Burchard.

ARTHUR BURCHARD, called as a witness on behalf of the defendants, having been duly sworn, testified as follows:

Direct Examination by Mr. Hays:

Q1. Dr. Burchard, you reside in the City of New York? A. Yes.

Q2. How long have you lived here? A. Since 1915.

Q3. Are you a member of the German Bar? A. Yes, sir.

Q4. For how long have you been a member of the German Bar? A. Since 1900. 2504

Q5. You were born in Germany? A. Yes, sir.

Q6. You received your education in Germany? A. Yes, sir.

Q7. And are familiar with both the German and the English language? A. Yes.

Q8. I show you Plaintiffs' Exhibit 2, together with the English translation attached thereto. I am interested in the question of the translation down to the word abzunehmen. Would you mind translating the German into English down to the word Abzunehmen. A. (Translating): "Agreement, Berlin, W. H., September 25th, 1914. I herewith confirm to you that the Reichseinkauf" 2505 —there is something said in here in parenthesis which seems to be put in by the translator, the translation of what Reichseinkauf means in English, but of course it is the name of a firm. It means Imperial or Government purchasers. (Continuing) —"in Hamburg, has been commissioned"—they say here "to receive." It is a technical term of German law.

Q9. What does abzunehmen mean? A. Abzunehmen means in German law the act of the buyer whenever the goods have been sold to him, that he is to take them in his possession and to take them away as to deliver now. That is much more than the word "receive."

Mr. Barnes: I move to strike out "that is much more than the word 'receive.'"

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Q10. According to your translation "abzunehmen" instead of meaning to receive would mean to take delivery of the actual goods? A. Yes, that is the real meaning of it. It is a small change, but it clears up the meaning. I will tell you what it is—

Mr. Barnes: If the Court please, I object to this witness telling us the meaning of the contract.

The Witness: I beg your pardon, I am not going to talk about the meaning of the contract. I am only going
2507 to talk about the translation.

Mr. Barnes: I have no objection to the witness who is properly qualified translating a contract from German into English. I do object to his telling the Court and telling us what the contract means.

The Court: The Court will pay no attention to his evidence, if he does.

The Witness: I am just going to translate: "—is commissioned to take delivery of mixed cargoes of wheat, tea, cocoa, concentrated feed, meat conserves, up to the value of about 600,000 marks for each ship's cargo which are
2508 shipped on neutral ships from American ports to neutral ports of the Baltic Sea, in the port of the Baltic Sea."

Mr. Hays: That is all, Doctor.

Cross Examination by Mr. Alger:

XQ11. What is the English word which you say should be substituted in place of the word "receive"? A. There is actually no exact English word that entirely complies with the German word because "abzunehmen" is a technical term. If you take the nearest approach in English you could only say, "to take something which has been given to you to take it."

XQ12. To take? A. To accept something which has been given to you for the purpose of delivering it. That is the only thing.

XQ13. The word "receive" in English also indicates the same thing, does it not? A. "Receive" is something entirely colorless. Anything that you get in some way is what you receive. But "abzunehmen" means something very definite. If you see the word "abzunehmen" in German, it is a technical term, and you know exactly what it means.

XQ14. It is a technical term which is customarily used in c. i. f. contracts in Germany, is it not? A. "Abzunehmen" is used—

XQ15. I asked you whether the word is not customarily used in c. i. f. contracts in Germany? A. Yes, because "abzunehmen" is a technical term of the German law of Contract of Sale and Purchase. Since this is a contract of sale and purchase, it must be used there too. That is understood. 2510

XQ16. Do you claim that this translation of that word "abzunehmen" into "receiver" is incorrect or insufficient? A. It is insufficient.

XQ17. You know, however, that in a German-English dictionary the word "to receive" is given as an English equivalent for "abzunehmen," do you not? A. The dictionaries do not give technical legal terms.

XQ18. The dictionary may be wrong. A. It is not a question of being wrong. The purpose of a dictionary is not to give a translation. 2511

XQ19. Excuse me. I have asked you a question, and I shall ask you to reply. That is the English equivalent given in the German dictionary for "abzunehmen," is it not? A. It is not, for this purpose.

XQ20. But for some purpose—

By the Court:

Q21. You are only asked whether the dictionaries say that? A. Some dictionaries may do it. Of course, there are some dictionaries that say that.

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Re-direct Examination by Mr. Hays:

RDQ22. What is the German word which means "to receive" when it is used in a colorless sense? A. "Empfangen."

Mr. Hays: I now introduce in evidence, your Honor, the deposition of Dr. Walter Frisch, taken in Berlin.

Mr. Barnes: If your Honor please, we shall have objections to some of the answers as they
2513 are made. I suggest possibly that somebody could take the stand as a witness and the questions could be asked, and the answers could be made, and then we could make our objections.

Mr. Hays: Suppose I read the questions and Mr. Abramson gives the answers.

"Deposition of DR. WALTER FRISCH, taken in Berlin, at the head office of the Dresdner Bank, Behrenstrasse 35-39, on October 15th, 1929, pursuant to the stipulation
2514 dated September 17, 1929, signed by Barnes, Avery & Whiting, attorneys for plaintiffs and by Arthur Garfield Hays, as attorney for defendants, Zentraleinkaufs-Gesellschaft.

"Appearances: William Abramson, attorney for Z. E. G. defendant, and Brainard Avery and George W. Alger, attorneys for plaintiffs.

"It is stipulated that objections to questions as to form shall be made at this time; all other objections shall be disposed of as provided in the aforesaid stipulation of September 17, 1929.

"By Mr. Abramson:

"Q. Where is your domicile? A. Berlin-Charlottenburg, Sophienstr. 32.

"Q. What is your occupation? A. I am a member of the directorate of the Dresdner Bank. (Vorstandsmitglied der Dresdner Bank.)

"Q. In September, 1914, were you connected with the Reichseinkauf? A. Yes, I was—at that time a Commissioner of the Department of the Interior, at Berlin, and at the office of the Hamburg-American Line, at Hamburg, the office of Mr. Ballin.

"Q. At that time—September, 1914, were you connected with the German Government? A. Yes, I was an official of the German Imperial Government. 2516

"Q. At that time you had also some connection with the Reichseinkauf? A. Yes.

"Q. Was your position that of a manager? A. At that time not.

"Q. How long did your connection with the Reichseinkauf continue? A. It was continued until the Z. E. G. was founded.

"Q. In other words, you continued to represent that organization? A. I was, during the war an Imperial official, and as such I had to protect the interests of the Empire. I became a manager of the Zentraleinkaufs-Gesellschaft, but I continued at the same time to be a Government official. I was a manager of the Z. E. G. 2517

"Q. Did the purchase of goods by the Reichseinkauf come under your jurisdiction? A. Yes. The offers had to be submitted to me for my approval, and in addition, I was entitled to make purchases myself.

"Q. Did you know Hermann Sielcken? A. I made his acquaintance through Mr. Ballin as far as I remember in September, 1914.

"Q. Prior to September 24th, 1914, did you have any conversation with Mr. Sielcken with reference to the shipment of mixed cargoes of food stuffs, by Crossman & Sielcken to Baltic ports? A. Yes. I had such conversations with Mr. Sielcken prior to September 24, 1914, but do not know what date.

"Q. Where did the conversation take place? A. The conversation took place in the office of Mr. Ballin at Hamburg.

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"Q. Who were present? A. I think only Mr. Ballin, I and Mr. Sielcken.

"Q. Are you now able to state the exact conversation and what was said by Mr. Sielcken, Mr. Ballin and yourself? A. Yes. But I must add that this conversation took place at Mr. Ballin's office and also during a luncheon in a restaurant, as far as I remember, where other persons were present.

"Q. As I understand it, there were more than one conversation with Mr. Sielcken with reference to these
2519 shipments. A. Yes, there were more conversations.

"Q. They took place at about the same time. A. That I cannot remember.

"Q. What I want to know is, they took place within a few days? A. Yes.

"Q. I ask you again, are you now able to state the exact words said by Mr. Sielcken, Mr. Ballin and yourself? A. No, it is too long ago. I cannot remember the exact conversation.

"Q. Have you any memorandum from which you can refresh your recollection as to the substance of the conversation? A. Yes.

2520 "Q. Is this memorandum which I show you, the memorandum referred to by you?"

Mr. Barnes: If the Court please, at this point I wish to make an objection on the ground that the witness was shown a memorandum without his memory having been exhausted as to whether or not he could remember the substance of the conversation.

The Court: I shall overrule your objection to this question. I do not know what is going to happen.

Mr. Barnes: He says, "Is this memorandum which I show you, the memorandum referred to by you?"

The Court: I shall overrule your objection. You may have an exception.

Mr. Hays (continuing):

"A. I believe this is only a copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossman & Sielcken.

"By Mr. Abramson: I hand this paper to the stenographer, and ask to have it marked for identification.

"The paper is marked by the stenographer as Defendants' Exhibit A for identification. 2522

"Q. Dr. Frisch, where is the original of the Defendants' Exhibit A for identification? A. I cannot tell where the original is. I presume it forms part of the files of the Department of the Interior. (Reichsamt des Innern)."

Mr. Barnes: I move to strike out that portion of the answer which says, "I presume it forms part of the files of the Department of the Interior."

The Court: Overruled. You may have your exception. 2523

Mr. Hays (continuing):

"Q. When did you last see the original? A. At the moment when I dispatched it.

"Q. Which was when, do you remember? A. I think it was the date of the report.

"Q. Did you make any efforts to find the original report? A. No.

"Q. Have you, during the last few days done anything to locate the original report? A. I had a conversation about it with Dr. Israel, and I asked Mr. Israel to trace it, so that I might compare the copy with the original and identify my signature.

"Q. Did Dr. Israel report to you that he was able to find the original? A. No. He informed me that so far he had not been able to trace the original.

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"Q. Do you know if the Exhibit A from the defendants is a copy of the original report, to the best of your recollection? A. I have every reason to suppose that it is a copy of the original, to the best of my recollection."

Mr. Barnes: I move to strike that answer out upon the ground that it is not responsive to the question.

The Court: Overruled.

Mr. Barnes: Exception.

2525 Mr. Hays (continuing):

"Q. Was this report or memorandum the Defendants' Exhibit A, made before or after your talks with Mr. Sielcken? A. The report must have been made after the conversation with Mr. Sielcken."

Mr. Barnes: I also move to strike that out upon the ground that it is not responsive to the question.

The Court: It does not amount to anything. I shall attach no significance to it.

2526 Mr. Hays (continuing):

"Q. Dr. Frisch, does this report, Defendant's Exhibit A, refresh your recollection as to the substance of your conversation with Mr. Sielcken? A. Yes.

"Q. Refreshing your recollection from the report, Defendant's Exhibit A, can you state the substance of your first conversation with Mr. Sielcken, what he said and what you said, as near as you recollect it."

Mr. Barnes: I object to that upon the ground that no proper basis was laid for permitting the witness to refresh his recollection by looking at this document, inasmuch as his recollection had not been exhausted as to the substance of the conversation before the memorandum was shown to him.

Mr. Hays: I had supposed, your Honor, that a

witness could refresh his recollection with anything.

The Court: So he can, if there is any occasion. All you have asked him to state was the exact language of a conversation. You have not laid the basis for using a memorandum yet, have you?

Mr. Hays: I think your Honor ought not to be technical about it, but ought to be liberal.

The Court: I am not a jury. I shall hear this and see what I shall do with it.

Mr. Barnes: I understand your Honor is not 2528
a jury. I know if you are satisfied after you have examined the deposition carefully that the evidence is not competent it will not make any difference to you.

The Court: If you have not made the memorandum itself competent, and you do no more than read the memorandum into the record, I shall not consider it.

There is a rule of evidence about using a memorandum. You have got to go pretty far before you can put in evidence a memorandum.

(Discussion.) 2529

Mr. Hays (continuing):

"Q. Refreshing your recollection from the report, Defendants' Exhibit A, can you state the substance of your first conversation with Mr. Sielcken, what he said and what you said, as near as you recollect it? A. I stated before that there were several conversations at different places and at this distance of time it is impossible to give the exact words of the conversations.

"Q. I am not asking you for the exact conversation, but I want to know, does the Defendants' Exhibit A refresh your recollection as to the substance of your first conversation with Mr. Sielcken with reference to the shipments of foodstuffs to Baltic seaports? A. Yes. It has.

"Q. Will you state the substance of your first con-

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versation with Mr. Sielcken and also state when and where it was held? A. The question was put to Mr. Sielcken, whether he would undertake to ship mixed cargoes of foodstuffs of various kinds to Baltic ports, when the war risk was borne by him and what he would charge for it.

"Q. Who put the question? A. I don't remember, either Mr. Ballin or myself.

"Q. What was Mr. Sielcken's answer? A. Mr. Sielcken considered the matter, and after some time, perhaps
2531 on this occasion, perhaps on another occasion, he agreed to ship the cargoes to Baltic ports, and to inform his partners in America. I wish to add that it is likely that there have been other conversations about this matter when I was not present between Mr. Ballin and Sielcken, and that it is possible that Mr. Ballin wrote or telegraphed Excellency Richter, so that I got the knowledge afterwards."

The Court: Do you consider any of that competent?

Mr. Hays: The only thing I consider competent is what he said was the conversation with Sielcken.
2532 There is a direct question on that, your Honor.

(Discussion.)

Mr. Hays (continuing):

"Q. Do you recall any other conversations with Mr. Sielcken other than the one you have just testified to, referring to the same subject? A. It is too long ago. I think I spoke with him several times, but I cannot say.

"Q. Did you speak to Mr. Sielcken after he had consulted with his partners in New York? A. I believe Mr. Sielcken concluded the transaction without having consulted his partners previously.

"Q. On what do you base that belief? A. Because he told me that he was going to inform his partners of the transaction.

"Q. Mr. Frisch, when was the conversation, to which you have testified, held? A. As far as I remember, it must have taken place before I made the report for his Excellency Richter.

"Q. Where was it held? A. I think at the head office of the Hamburg American Line.

"Q. At what place? A. Hamburg, Alsterdamm.

"Q. You stated, Dr. Frisch, that Mr. Sielcken considered the matter, will you state what Mr. Sielcken said at this conversation? A. I cannot remember the exact words, the chief point was that Mr. Sielcken was to bear 2534
the war risk, and that of course he had to consider it. For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should conclude the transaction with him.

"Q. What did Mr. Sielcken finally say about assuming the war risk? A. He said that he would undertake it for a reasonable commission.

"Q. Was the commission mentioned? A. Yes. I think in the report to Excellency Richter it is said that the 2535
commission is to be 10 per cent of the value; and it was said that the commission is reasonable in comparison with the danger.

"Q. You stated, Dr. Frisch, you could not conclude other business transactions: Did you refer to other business transactions with Crossman & Sielcken? A. No, I think it was the only business transaction with Crossman & Sielcken. We tried to make other business with other firms; especially I remember we tried to get from American mills to Swedish ports, and in this case we could not cover the full war risk.

"Q. After your talks with Mr. Sielcken, which you testified to, did you prepare a letter or document to be sent to Mr. Sielcken? A. My report, was accompanied by a draft of a letter to Mr. Sielcken confirming the transaction to him. As far as I remember Mr. Richter

has undersigned this and sent this to Crossman & Sielcken in care of Mr. Sieleken in Hamburg.

"Q. Is this a copy of the document, or letter, referred to by you? A. Yes, I think so.

"Mr. Abramson: I ask to have this marked Defendant's Exhibit B for identification.

"I offer Defendants' Exhibit A for identification in evidence subject to translation.

"Mr. Alger: I object, and will object at the trial to the receipt of this instrument in evidence,
2537 as incompetent, irrelevant and immaterial and without a sufficient or any foundation having been laid therefor. This objection does not relate to the lack of proof of efforts by Dr. Israel or Dr. Frisch to locate the alleged original report or to its being in the German language."

Mr. Hays: I offer Defendants' Exhibit A for identification in evidence, subject to translation.

Mr. Barnes: It is what purports to be an extract from a report by this witness to Dr. Richter, dated September 23rd, 1914.

2538 The Court: It has been stipulated in this case, as I understand it, that this paper which is Exhibit A of the answer of this concern Z. E. G. was the instrument under which these shipments were made.

Mr. Hays: Yes, sir. But now the offer that is made here is the memorandum.

The Court: I shall exclude it if Mr. Barnes objects to it.

Mr. Barnes: I object to it.

The Court: Then I exclude it.

Mr. Hays: May I have it marked for identification?

The Court: Certainly.

(Marked Defendants' Exhibit D for identification.)

Mr. Hays: May I have a translation marked? I have not a translation here.

The Court: You may supply a translation later. It will be marked Exhibit D-1 for identification.

Mr. Barnes: We move to strike out the answer, "I believe this is only a copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossman & Sielcken," upon the ground that no proper foundation was laid for showing the witness a paper to refresh his recollection, his memory not having been exhausted as to whether or not he could testify as to the sub- 2540
stance of the conversation between himself, Mr. Sielcken and Mr. Ballin.

The Court: It is my impression that that is absolutely true. If we had the witness here I would not let him look at it for a minute. When was this deposition taken?

Mr. Hays: Last summer.

The Court: What is the question?

Mr. Barnes: The question is, "Is this memorandum which I show you, the memorandum referred to by you?"

Then the answer is, "I believe this is only a 2541
copy, but I think I can remember positively that I have drawn a report for his Excellency Mr. Richter dealing with the transactions with Crossmann & Sielcken."

The Court: I shall deny your motion, Mr. Barnes. You may have an exception.

Mr. Barnes: Then I come down to this question and answer:

"Q. You stated, Dr. Frisch, that Mr. Sielcken considered the matter, will you state what Mr. Sielcken said at this conversation? A. I cannot remember the exact words, the chief point was that Mr. Sielcken was to bear the war risk, and that of course he had to consider it. For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that

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we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should conclude the transaction with him."

I move to strike out that part of the answer which begins with the words, "For us, we had the great interest, because up to this point in other business transactions we had not succeeded in covering the full war risk. I may add that we knew Mr. Sielcken to be a great pro-German and that consequently we hoped that we should con-
2543 clude the transaction with him," because that was not asked. It was a statement entirely volunteered.

The Court: Does Mr. Hays insist on the rest of that answer?

Mr. Hays: I do not think it is very important.

The Court: Then strike it out.

Mr. Barnes: Then we come to this:

"Q. What did Mr. Sielcken finally say about assuming the war risk? A. He said that he would undertake it for a reasonable commission."

We move to strike that out because the witness
2544 has testified only as to the first conversation. Then he has said that there were other conversations at which he was not present, and that it may be that he had obtained his information from Mr. Ballin or Dr. Richter. Then he is asked what Mr. Sielcken finally said, not at the first conversation, not at the conversation at which Mr. Sielcken said that he would have to consider it. This witness has not testified that he was present at such a conversation. He said there were other conversations at which he was not present.

Therefore, we say it clearly appears from the witness's testimony that he is testifying as to something which he has obtained from what Mr. Ballin or Dr. Richter told him.

(Discussion.)

The Court: I shall overrule your objection, Mr. Barnes. You may have your exception. But I shall attach very little weight to what is said there. It is so vague I can not tell what it means.

Mr. Barnes: Then we have this:

"Q. Was the commission mentioned? A. Yes. I think in the report to Excellency Richter it is said that the commission is to be 10 per cent of the value; and it was said that the commission is reasonable in comparison with the danger." 2546

I move to strike out everything in that answer after the word "yes."

The Court: Motion granted.

Mr. Hayes: Exception.

Mr. Barnes (reading):

"Q. You stated, Dr. Frisch, you could not conclude other business transactions: Did you refer to other business transactions with Crossman & Sielcken? A. No, I think it was the only business transaction with Crossman & Sielcken. We tried to make other business with other firms, expecially I remember we tried to get from American mills to Swedish ports, and in this case we 2547 could not cover the full war risk."

I move to strike out all of the answer beginning with the words "We tried to make other business with other firms."

The Court: Motion granted.

Mr. Hayes: Exception.

Mr. Barnes: I think that is all, sir.

Mr. Hays: The defendant Z. E. G. now offers in evidence a stipulation of December 20th, today.

(Marked Defendants' Exhibit E.)

Mr. Barnes: There is a whole lot in that stipulation to which we want to make objection.

The Court: Mr. Barnes says that he objects to part of the stipulation. It had better be stated on the record

that his right to interpose those objections is not waived by its being marked at this time.

Mr. Barnes: May I ask how late your Honor is going to sit?

The Court: I had hoped to finish the case this afternoon. However, I am willing to sit until seven o'clock.

(Discussion.)

(Mr. Hays then read paragraph 20 of Defendants' Exhibit E to the Court.)

Mr. Hays: I think the word "competency" ought to
2549 go out of that.

Mr. Barnes: Yes.

Mr. Hays: May I cross out the word "competency"?

Mr. Barnes: Yes.

(Mr. Hays then read Paragraphs 1 to 7, inclusive, of Defendants' Exhibit E to the Court.)

Mr. Barnes: As to Paragraph 7 and those immediately following, we have an objection upon the ground that they are immaterial and irrelevant. I should like to have them read, but we want our objection noted, and then your Honor may rule on them.

(Mr. Hays then read Paragraphs 8, 9, 10, 11, 12, 13,
2550 14, 15, 16, 17, 18 and 19 of Defendants' Exhibit E to the Court.)

Mr. Barnes: If the Court please, do you want to rule upon the admissibility that we referred to?

The Court: I shall read Mr. Hays' authorities.

Mr. Barnes: Suppose I make my objection, and your Honor can reserve decision.

The Court: Paragraphs 7 to 16, inclusive, all turn upon one question. They are utterly irrelevant unless Mr. Hays is right on his law. The only question you have there is whether it is *res adjudicata.*

Mr. Barnes: It could not be *res adjudicata,* because there was no final decree. But there would be a question of whether the agreement and compromise made would be binding. It is not a question of *res adjudicata.*

The Court: You understand what I mean. It really all turns upon the one question.

I want to consider Mr. Hays' authorities. If you have got any, I want to consider them also.

I shall read the authorities tonight.

(Discussion.)

Mr. Hays: I should like to move to amend my answer to conform to the proof with regard to the translation of Exhibit A attached to my answer.

Mr. Barnes: What are the words?

Mr. Hays: I should like to insert, "To take delivery of the corporeal property" instead of the word "receive." 2552

The Court: Substitute the words "To take delivery" for the words "To receive" in the third line of Exhibit A attached to your answer.

Mr. Hays: The amendment I want to make in my answer is to conform Exhibit A to the translation as testified to by Dr. Burchard.

The Court: Is there any objection to that?

Mr. Barnes: No, there is no objection to that.

The Court: Is there any further proof?

I am going to reserve ruling on these objections you have made to portions of Exhibit E. I shall try to read the authorities tonight, and in the morning we can take up the details. 2553

(Adjourned to December 21st, 1929; 10:30 A. M.)

New York, December 21st, 1929,
10:30 A. M.

Trial resumed.

The Court: Gentlemen, overnight I have examined the authorities you submitted to me.

I have also examined your briefs. First, I think this morning you should dispose of the questions that were pending last night on the objections raised to certain paragraphs of the Exhibit E. If either of you can

furnish me any additional light upon the question under discussion at the time of adjournment as to whether or not the outbreak of the war between the United States and Germany had the effect of *ipso facto* dissolving the partnership agreement, I would like to hear from you further upon that point.

Mr. Hays: Judge Caffey, the only cases that I have on it are Mayer v. Garvin; Rossi v. Garvin and Sutherland v. Mayer. I am sure I can get further authorities from the Civil War time and otherwise, but to me the
2555 matter is so clear. Mr. Barnes seems to find the distinction in the fact that here the parties were American citizens. I find no such distinction in Anglo-Saxon law.

The Court: On that proposition I do not think Mayer v. Garvin, Rossi v. Garvin and Sutherland v. Mayer have the slightest bearing on this question.

Mr. Hays: Upon the question of the dissolution of the firm?

The Court: Not the slightest.

Mr. Hays: That is all I have so far.

The Court: The proposition there is whether or not where there is an existing agreement between nationals
2556 of two countries who later go to war, as a result of the war that there is a dissolution of the partnership agreement.

In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.

I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership. It is very certain in my mind that it cannot affect the rights of the parties into ceasing with respect to a transaction which occurred long prior to the war.

I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does

not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provided in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.

It does not follow at all from that that he is an alien 2558
enemy in the sense that a national of the country with which we are at war is an alien enemy.

Mr. Hays: Will your Honor take the reasoning behind it? I would suppose the reason why the partnership was dissolved was because of the impossibility of intercourse during the war. If that is so, it would apply whatever the nationality of the particular individual might be. I would suppose that the partnership was dissolved because the people were in difficulty and because the American in Germany occupied an enemy status; and my view was the nationality had nothing to do with it, but I have nothing further to present to 2559
your Honor along that line.

The Court: It may very well be that during the period of the war, Mr. Hays, in respect to transactions occurring during the war would be affected by the Trading with the Enemy Act, and could be lawful only upon compliance with the provisions of that statute.

It does not follow that with respect to this property, the status of which had become fixed prior to the war, that the occurrence of the war so far dissolved that partnership as to change the rights with respect to that property. That is my view.

Mr. Hays: Well, now, you take, your Honor, powers of attorney during the war, in Sutherland v. Mayer, there was a power of attorney from the German in America to the firm abroad, the members of the firm abroad under which they were to pay certain amounts

of money to his firm and the Supreme Court of the United States held that power of attorney was revoked by the war.

I know in the Civil War a great many of those were revoked and none of these, so far as I know, have ever raised a distinction depending on the nationality of the individual.

The Court: It is a very clear distinction in my mind. I consider it of very little consequence whether I retain in the case the various paragraphs of Exhibit E
2561 from No. 7, as I recall, to No. 17, inclusive; or whether I merely pass upon the effectiveness.

Nevertheless, I wish Mr. Hays to give you an ample opportunity to reverse me if I am in error, and possibly it is a good way to put the record in the shape where it preserves your rights and pleadings and upon the renewal of Mr. Barnes' objection to these various paragraphs then I will pass upon them and Mr. Hays can take his exception.

Mr. Hays: Yes, sir.

Mr. Rhodes: Your Honor may I say a word on that? The Trading with the Enemy Act defines an enemy as
2562 any individual, partnership or any body of individuals of any nationality resident within the enemy territory.

The Court: Exactly.

Mr. Rhodes: The language does not say "nationality" but it says "resident within."

The Circuit Court of Appeals of this Circuit has held that "resident within" means domiciled in the case of Stadtmuller v. Miller.

The Court: I agree with that.

Mr. Rhodes: And then it goes ahead and says in Section 3:

> "* * * of any person in the United States except with the license of the President granted to such person, or to the enemy or allied enemy as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to or from, or for, or on account of or on behalf of, or for the benefit

> of any other person with knowledge or reasonable cause to believe, that such other person or enemy or allied enemy is conducting or taking part in such trade, directly or indirectly, for, or on account of or on behalf of, or for the benefit of the enemy or allied enemy * * *"

is unlawful to do that, and it goes ahead and provides penalties to do that.

If this partnership continued the conduct of the business by the American partner, residing in the United States, it would be in part for the benefit of the home 2564
partner, Sielcken, whom this evidence here shows was domiciled in Germany.

He had his estate over there; he lived there. His office was there, and his business was there. That was his home and domicile. That would be in clear violation of the Act for the American partner to continue to carry on the business for him; so it must obviously follow that the partnership was dissolved upon the declaring of war because nowhere in the Act is there based upon citizenship any standard, but it is based upon domicile.

The Court: That is entirely true, so far as any current transactions or communications between them are 2565
concerned, but in so far as concerns transactions occurring long prior to the war—and that is what we are concerned with here—I am going to hold that it certainly follows that the German executives of Sielcken had no authority to deal with that prior transaction so as to determine, as between the German Government or of this organization acting for the German account that you referred to, to be adjudicated or passed upon in any such proceeding.

Mr. Rhodes: As I understand your Honor, you do not rule that the partnership was not dissolved.

The Court: It may have been suspended for the purposes of the Trading with the Enemy Act. You may call it dissolved. I do not care what you call it.

I am trying to draw a distinction between the necessary consequence of the war and the provisions of the Trading with the Enemy Act, because we are not concerned with the provisons of the Trading with the Enemy Act here in that regard.

Mr. Rhodes: I gleaned the impression that you thought there was a distinction between an American citizen residing in Germany and a German citizen.

The Court: There is a vital distinction. It is a governing distinction.

2567 Mr. Rhodes: I do not see that, your Honor.

The Court: Mr. Rhodes, it is not true to the extent that you are dealing with these matters which, as a matter of municipal regulation, come under the administration of the Trading with the Enemy Act. That is true.

Mr. Rhodes: But, your Honor, the purpose of Congress was to place all persons resident in Germany, because Congress realized that some of the most dangerous enemies we had were American citizens that came over here and made their money and went back to Germany. There is nothing wrong about seizing the property of an American citizen providing it is not

2568 confiscated; and it was, under the Trading with the Enemy Act, done throughout the war repeatedly; and Congress even provided for the return of property to American citizens after the Armistice, long before the state of war had ended.

In 1919, they provided for the return of property to American citizens. That was to return the property of American citizens who were involved in this Act.

The Court: The Trading with the Enemy Act had two general purposes.

One of them was to assist in the more effective prosecution of the war; and the other one was to ameliorate some of the old hardships of the war and Congress may or may not have been wise in some of the provisions it made in that regard, but, nevertheless, that was the endeavor on the part of Congress on this question; which, as I see it, is not determined by the provisions of the Trading with the Enemy Act.

Mr. Rhodes: I am not prepared to discuss the power of the German executives on the German law; but I want to clear this point so that it will be clear, and so that there would not be any mistake on that point, because it seems to me that it was absolutely correct that this partnership was dissolved by the declaration of the war because the partners were domiciled in different countries.

The Court: I am going to give you a square ruling and you can take an exception.

I have not had a great deal of time to make up my 2570
mind, but I have examined all the authorities to which I have access and I have reached a conclusion in my own mind.

Mr. Rhodes: That the partnership was dissolved?

The Court: No, it was not, not for the purpose so far as we are concerned with it in this case.

Mr. Barnes: As I understand it, your Honor's ruling is going to be directed to the fact as to whether or not this settlement in Germany is binding upon these plaintiffs, whether it is for one reason or another is not involved in your ruling.

The Court: Nevertheless I will express one ground 2571
for it.

Mr. Barnes: On this I would like to give you a thought that occurred to me at five o'clock this morning, and those thoughts are generally good.

In Section 19 of our stipulation it is provided as follows: That in September, 1917—this was before Herman Sielcken was dead.

The Court: Yes.

Mr. Barnes: The War Trade Board of Washington reversed the Trading with the Enemy license to the co-partnershp of Crossman & Sielcken and directed that the co-partnership be liquidated by Sorenson & Nielson, that is, the plaintiffs in this case, that is, September, 1917, of the American citizens.

The American Government steps in and says this thing is to be liquidated by Sorenson & Nielson.

Can you tell me of any German executive going ahead and liquidating or settling or making any arrangement that is binding upon our Government the time of which is dated in the time of war? That is an ample sufficiency, in my opinon, to sustain the position taken.

The Court: Yes, I am just giving you an illustration of what I say the Trading with the Enemy Act was intended for—to ameliorate the hardships of war.

Mr. Rhodes: Would your Honor's ruling be affected if you came to the conclusion that the settlement had
2573 been ratified by Sorenson and Nielson?

The Court: I have not heard the slightest evidence of that. You will find there was no ratification on the part of Mr. Nielson.

Mr. Rhodes: Is Mr. Nielson here?

(No response.)

Mr. Barnes: Then for the purpose of your Honor's ruling the plaintiffs object upon the ground—

The Court: Take it paragraph by paragraph.

Mr. Barnes (continuing): —upon the ground that the facts therein stated are irrelevant and immaterial to the following paragraphs of the stipulation which has
2574 been marked—

The Court: Exhibit E.

Mr. Barnes (continuing): —Exhibit E.

The Court: Call them by paragraphs.

Mr. Barnes: Paragraph Seven.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Eight.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Nine.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Ten.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Eleven.

The Court: I have forgotten what Paragraph Eleven

Mr. Barnes: That is that the arbitration proceed and the parties—

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Twelve.

The Court: That is as to the provision for expenses.

Mr. Barnes: Yes.

The Court: Sustained.

Mr. Rhodes: Exception.

Mr. Barnes: Paragraph Thirteen.

The Court: Sustained. 2576

Mr. Rhodes: Exception.

The Court: I may say that in that connection, I do not find the slightest evidence there of ratification.

Mr. Rhodes: These letters that were exhibits in 1920 for a period of seven years seem to be some evidence of acquiescence.

The Court: None whatever.

Mr. Rhodes: Full knowledge.

Mr. Barnes: Paragraph Fourteen.

The Court: I have not a memorandum of that.

Mr. Barnes: That is that Mr. Nielson was in Germany. I will not object to that. I will let it in. 2577

Mr. Rhodes: Yes. May I make this clear on the record?

I understand the objection is to each and every part of those paragraphs, is that right, Mr. Barnes? I think the Judge ruled on each and every part. There may be some parts there that may be different from other parts, and Judge Caffey ruled that they all follow the same category.

The Court: You are correct. You are entitled to have that square ruling.

Mr. Barnes: I have a little doubt—

Mr. Rhodes: What I have in mind is this: We have some letters there that in themselves may not be competent or material. If not, if Judge Caffey rules with me, I want to be sure that you are objecting to each and every part of the paragraphs.

Mr. Barnes: I think, if your Honor please, that I will

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withdraw my objections and let the stuff in and accept your Honor's ruling on the law.

The Court: I do not think it makes the slightest difference.

Mr. Barnes: I do not think it makes the slightest difference, either. I do not see any point to my grounds for appeal. I will withdraw all my objections.

The Court: Now, gentlemen, I have another question to submit to you before we proceed further.

I have been thinking about the Fisch deposition; and
2579 I have been studying it the best I could. The September 25, 1914 letter, Exhibit A and the answer of Mr. Hays here.

Where a deposition is taken under the circumstances of that deposition, a long ways from home, counsel present on both sides I should be unwilling, as I said yesterday, to enforce very strictly the rule as it might be enforced if the witness were here present on the stand as to a thorough establishment of his inability to remember a transaction inquired about without resort to a paper, before permitting him to resort to that paper for the purpose of refreshing his recollection; and as
2580 I indicated yesterday, therefore, so far as concerns that ground I was unwilling to sustain Mr. Barnes' objection; but as to that he had another ground, and I recall his statement of his objections, and that I want to consider.

The portion of the deposition of Dr. Fisch, as I let it in, as I told you yesterday, is so very general, that it does not seem to me sufficient to sustain the finding of a separate and independent agreement between Sielcken and the German agency whereby Crossman and Sielcken undertook to bear the risks of transportation of these cargoes across the ocean.

But there is another point, and that is this: It goes to the competency of this evidence; and I am doubtful whether I was right in letting it in on that ground. That is what I want to bring up for your consideration here and to hear from you on.

As you read the testimony of Dr. Fisch with its only

two courses preceding the entering into of this instrument, the letter of Aprl 25, 1914, which contained—

Mr. Barnes: September.

The Court (continuing): —of September 25, 1914, which became the exclusive basis for the conduct of these transactions; I am therefore very doubtful whether or not I should sustain Mr. Barnes' objection to the admission of that testimony as to those oral conversations. Am I right in my recollection that that was the ground of your objection?

Mr. Barnes: That was one of the grounds, yes. I 2582
objected to it on the ground it was incompetent.

The Court: I would like to hear from you on that, both of you.

Mr. Hays: My argument is so simple that it will doubtless occur to your Honor, we have chiefly testimony contradicting the terms of a written contract; and I should say it was inadmissible to any interpretation of that written contract or of the contract itself.

I think conversations that do not bear on the contract or make clear the interpretation of the contract and what was in the minds of the partners must be irrelevant. 2583

Suppose, for instance, Fisch had said what I have said in my argument to your Honor. It is insane to conceive that these men would have made a contract by which the risk of loss would have been on the Germans, because if they had the goods would have been seized immediately; and I cannot conceive of any man of intelligence having made such an agreement and I do not think they did.

Fisch says he had a conversation with Sielcken by which Sielcken claimed all the risk of loss was on him. It does not vary anything in the contract, because it does not say where the risks and losses were. It says, according to my interpretation, that the Germans had no obligation at all on the goods delivered in Baltic ports.

(Discussion.)

Mr. Barnes: On that point my position is this: That the contract itself, assuming that it is and if you re-

gard it as a purchase agreement or as a C. I. F. contract—

The Court: I do not care whether it is a purchase contract or whether it is an instrument under which these exclusive transactions were conducted—I am not passing now upon that—but I am getting down to the point as to whether the controversy, if it should be dissolved upon the assumption that this instrument were for the exclusive memorial of the arrangement between them upon which they acted. Therefore, I want to determine
2585 whether it is competent or not for me to give weight to the various negotiations that preceded the formulation of this document. That is what I am trying to get at. I am not deciding the case one way or the other at this time.

Mr. Hays: If that is so the conversations would not vary it.

Mr. Barnes: The stipulation which we made—

The Court: I read the stipulation.

Mr. Barnes: That says that Exhibit A is a complete copy of the agreement between the parties, and upon the basis of that stipulation Mr. Hays is permitted
2586 to come into this court by agreeing to it. He was in default and we opened his default and I consented to be bound entirely by everything in that stipulation.

Mr. Hays: I am trying to avoid it.

Mr. Barnes: I know you are.

(Discussion.)

Mr. Barnes: I think I had better let it go in.

The Court: I am going to give a square ruling.

Mr. Hays: Of course, I would prefer to have the ruling. I am not thankful to Mr. Barnes when he says that it does not make any difference.

The Court: All right; I will exclude the testimony so that you may have your exception.

Mr. Hays: Thank you. I take an exception.

Will your Honor state the grounds of your ruling?

The Court: It is incompetent, for one thing; and it does not prove anything to let it in, so it is irrelevant.

Mr. Hays: I take an exception.

The Court: Proceed.

Mr. Barnes: I want to clear up the record with respect to definition of German Law that has been set up.

The Court: Well, now, Mr. Barnes, I want to go ahead and get a record before me and then I am going to hear all oral argument. Are you going to put in testimony or close?

Mr. Barnes: There is no more testimony. It is a stipulation.

The Court: Do you mean you close now? You rest?

Mr. Barnes: No, I want to put this stipulation in 2588
first.

The Court: Oh, there is a stipulation.

Mr. Barnes: It is stipulated by the defendants that they withdraw the defense of foreign law which is set up in the third and fourth separate defenses of the defendant Z. E. G. and that for the purposes of this case the Court is to decide the construction to be given the agreement, Plaintiffs' Exhibit 1, by the rules of American Law.

Now, I think everybody rests.

Mr. Hays: Yes, sir.

Mr. Barnes: And we rest. 2589

The Court: Everybody rests.

Mr. Hays: I move to dismiss the plaintiffs' case on the ground that the plaintiff has not shown a cause of action or any liability on the part of the defendant Z. E. G.

Mr. Rhodes: Your Honor, I move that the bill of complaint be dismissed because the plaintiff has not established a cause of action.

The Court: Motions overruled, and you may have your exceptions.

Mr. Rhodes: Note an exception.

TESTIMONY CLOSED.

(Argument by Mr. Barnes.)
(Argument by Mr. Hays.)
(Argument by Mr. Rhodes.)
(Argument by Mr. Abramson.)

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Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSON, as the surviving partners of Crossman & Sielcken,
Plaintiffs,

2591 vs.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFSGESELLSCHAFT, m. b. H.,
Defendants,

In Equity 44-28.

Before: Honorable Francis G. Caffey, District Judge.

Barnes, Avery & Whiting, Solicitors for plaintiff, Earl B. Barnes and George W. Alger, counsel.

2592 Charles H. Tuttle, United States Attorney, Solicitor for defendants, Thomas E. Rhodes, Special Assistant to the Attorney General, Counsel.

Arthur Garfield Hays, Solicitor for defendant Zentral-Einkaufsgesellschaft, Arthur Garfield Hays and William Abramson, Counsel.

Memorandum Opinion.

The Court (Orally): Gentlemen, when I accepted the assignment to try this case, I told you that it would be necessary for me to render a prompt decision; that it would be impossible for me to reserve decision, and in the nature of things, it is impossible for me in rendering an immediate decision, to formulate any elaborate or reasoned statement of the grounds for my decision.

All that I can do is to give you an indication of the steps in my reasoning, by which I reach the result.

It seems to me that this case, under the proof, can be completely determined by resorting solely to an interpretation of the document in evidence, which has been referred to as the letter of September 25, 1914. I see no escape from the interpretation of that letter, under the circumstances of its issue, under the uses for which it was intended and under the uses made of it, except that Crossman & Sielcken became merely purchasing 2594
agents in the employ of the Reichenskauff. If I am right on that, that is the end of the case, and disposes of the issues, and I think I am right. It is true that Mr. Hays urges that there are expressions in the last paragraph of it, which were not necessary to be incorporated in it, if the document was designed to define the relationship between principal and agent. Nevertheless the incorporation in the document of unnecessary clauses is not controlling in its interpretation, and I see nothing in the last paragraph that is inconsistent with the existence between Crossman & Sielcken on the one hand and the Reichenskauff on the other, or an agency by Crossman & Sielcken for their employer. 2595

It is not necessary, therefore, for me to go into the various other phases of the case.

Nevertheless, from the time I took the course on Carriers from Professor Beale in law school, it has been my impression that the fact of the issuance of bills of lading, with their accompanying shipping documents, under the circumstances revealed by the evidence in this case, caried with it the risk on the part of the purchaser or consignee of loss of the goods during the course of transportation. I see nothing inconsistent with that view in the expressions of Professor Williston in his book on Sales to which reference has been made here.

I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914.

Now, I think that disposes of all the substantial issues in this case.

The plaintiff may have a decree for the relief asked for in the complaint. The decree may be settled upon notice. As to the notice, you gentlemen can agree upon it. How much notice do you want?

Mr. Barnes: Three days notice?

The Court: Very well, three days notice.

2597 Mr. Hays: I am not sure whether the decree necessarily carries interest. I should say, in a court of equity, where the plaintiff slept on his rights during a number of years, is a matter for consideration, but at any rate, if there is any question about it, I would like to save my point on that.

The Court: I will hear from you. I assumed as a matter of course, that it would carry interest. The money was there; it has been earning interest while it was down there and I do not see why those entitled to it should not have the benefit of it.

Mr. Hays: If your Honor will make a ruling on it, I will save my exception.

2598 The Court: The recovery of the plaintiff will carry interest.

Mr. Rhodes: What interest? The legal rate of New York?

The Court: What has been the custom in such cases here?

Mr. Barnes: The usual rate of interest, six per cent.

The Court: Is that the usual custom? Tell me what is the custom?

Mr. Rhodes: The custom, as I understand it, is that the contract is covered by the law of the state under which it is made. For instance, a contract in the State of Louisiana carries five per cent interest; I understand that interest in this state is six per cent.

The Court: I think so. It will be six per cent interest and you may have your exception.

Mr. Hays: Exception.

New York, December 21st, 1929.

Reply Affidavit of Franck C. Sterck. 2599

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.
In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28. 2600

City of New York,
County of New York, ss.

Frank C. Sterck, being first duly sworn, deposes and says: 2601

That he is an attorney in the United States Department of Justice.

That he has examined the affidavits of Messrs. Brainard Avery, William Abramson, Selden Bacon, George O. Castell, Richard S. Doyle, Charles D. Hamel, Orrin R. Judd, John F. McIlwain, Leonard B. Smith, George E. Warren and Frederick Wirth, Jr., and the exhibits attached thereto, in Proceedings to Vacate Final Decree in the above entitled matter.

The affidavit of Mr. Brainard Avery, insofar as material and relevant to these proceedings on Motion to Vacate Final Decree, attempts to establish three points:

1. That the claim arising out of the one-half interest of the firm of Theodor Wille in the cargoes was settled and discharged prior to the institution of this cause, the payments of $50,000 each by the defendant Z. E. G. and

by the plaintiffs having been made to Theodor Wille out of the funds recovered herein because of some threatened claim, the basis of which was never made known to the plaintiffs or their attorneys or apparently to any one else connected with the case.

2. That the bringing of this suit in the names of the surviving partners, without joining the executor as a party, was proper even after dissolution of the partnership.

2603 3. That the payment by the plaintiffs of $363,340.70 to the attorney for the defendant Z. E. G. out of the money recovered in this case was simply a compromise of a claim existing under an indemnity agreement signed by the German Executors of the Estate of Hermann Sielcken in Germany.

With reference to the first point, attention is called to extracts from the affidavit sworn to by this deponent on May 18, 1938 and to the exhibit attached thereto: On page 4 of said affidavit there is set forth a letter from Hermann Sielcken to John S. Sorenson, one of the plaintiffs in this case, dated September 22, 1914, in which it is stated that 2604 "Wille share the risk with us" (Exhibit E). On the same page of deponent's affidavit there is quoted an extract from an affidavit executed by Mr. Sorenson on October 26, 1927, in which he states that he received instructions from Sielcken "to purchase and ship food and similar stuff for the joint account of Crossman and Sielcken and Theodore Wille, Hamburg."

In a sworn claim filed in 1922 before the Mixed Claims Commission, United States and Germany (Exhibit L of this deponent's main affidavit), the then Columbia Trust Co., as Executor of Sielcken's estate, together with the plaintiffs in this case, sought an award against Germany "for the loss sustained by them as aforesaid in the sum of $190,133.65, being one half of the total value of said merchandise ($380,266.09)." The reason for claiming only one-half of the value of the cargoes in this Memorial is therein stated to be because "it was agreed that the merchandise so to be purchased and shipped

should belong in equal undivided shares to the said two firms of Crossman & Sielcken and Theodor Wille respectively, and that the purchase and sale should be for their joint account as a joint adventure."

When in 1931, the widow of Herman Sielcken, Clara Sielcken-Schwarz, brought an action in the Surrogate Court for New York County against the Irving Trust Co. as executor of the Estate of Sielcken, there was admitted in evidence (marked Petitioner's Exhibit 543), a copy of an extract from certain Crossman and Sielcken ledgers known as "Crossman and Sielcken, Copenhagen Joint Account." 2606 The ledger shows the entry "to amount of Theodor Wille's half share of loss on Copenhagen cargoes shipped in 1915." The shipments listed thereon are the shipments upon which this suit was brought (Exhibit U of this deponent's main affidavit).

It will be noted that the affidavit of Mr. Avery in no way modifies, disputes or contradicts the fact of the joint ownership of the cargoes at the time of their seizure by the British authorities.

On the contrary, the affidavit of Mr. Avery admits (page 6) that the Memorial filed before the Mixed Claims Commission sought "to recover only a one-half interest in the cargoes on the theory that Theodor Wille was responsible 2607 to Crossman & Sielcken for one half of the loss." Mr. Avery explains, however (page 7), that counsel who filed that Memorial, although aware that "Mrs. Sielcken claimed to have adjusted that matter herself with the firm of Theodor Wille," advised the executor that Mrs. Sielcken "had no authority to make a settlement of any claims of the firm, and the supposed settlement with the firm of Theodor Wille made by her was not binding."

It further appears from Mr. Avery's affidavit that the executor having reversed itself in 1924, acknowledged that the settlement made by Mrs. Sielcken with Wille was binding (page 7-b); that the claim of Crossman & Sielcken against Theodor Wille was thereupon "charged off to Profit and Loss on the books of Crossman & Sielcken" (page 7-b); and that because of such settlement the firm of Theodor Wille acknowledged in 1927 and 1928, that

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it no longer had any interest in the seized cargoes (pages 7-b and 8).

It will be observed from Mr. Avery's affidavit, therefore, that it is admitted that prior to as well as at the time of seizure in 1915, a one-half interest in the cargoes unquestionably existed in the firm of Theodor Wille; that a settlement was made by Mrs. Sielcken and the German executors with the firm of Wille pursuant to which that interest, standing on the books of Crossman & Sielcken as Theodor Wille's share of the loss of the
2609 cargoes, was written off in 1924; and that counsel for the plaintiffs in the instant case were fully advised by counsel representing Wille, prior to the institution of this suit in 1927 and 1928, that such an interest did exist until the date of the settlement which occurred subsequent to October 6, 1917. In other words, it is now clearly established, through copies of formal claims, sworn affidavits, letters and books of account, that the partnership of Crossman & Sielcken was not at any time prior to the passage of the Trading with the Enemy Act (October 6, 1917), nor for several years thereafter, the sole owner of the shipments out of which arose the alleged debt for the recovery of which the present suit was filed.

2610 The affidavit of Mr. Avery proceeds to explain at great length the matter of the "threatened claim" (page 42) which Theodor Wille asserted against the funds paid by the Alien Property Custodian and Treasurer of the United States pursuant to the decree entered in this case. According to Mr. Avery (page 41), he was informed by Mr. Hays' office that the firm of Theodor Wille would sign certain releases and join in the settlement of March 27, 1930 (see Exhibit W of this deponent's main affidavit), whereby it was provided among other things "that the claim of Theodor Wille against Crossman & Sielcken in liquidation, and/or Estate of Hermann Sielcken, and/or Mrs. Clara Sielcken-Schwarz, and/or Zentral Einkaufsgesellschaft, should be finally settled by the credit of the sum of $100,000 in favor of Theodor Wille Santos with the J. Henry Schroder Banking Corporation, 46 William Street. This sum of $100,000 was contributed, $50,000 by

Zentral Einkaufsgesellschaft and $50,000 by Crossman & Sielcken in liquidation."

Mr. Avery's affidavit emphatically reiterates for some ten pages (pages 40 to 50) that the nature of the claim was entirely undisclosed, its basis unknown, and, in fact, that he, Mr. Avery, and his associates, Messrs. Barnes and Doyle, were of the impression "that this application for $100,000 was in the nature of a 'hold up'" (page 46).

It will not escape the mind of any one reading Mr. Avery's affidavit, of course, that the payment of $100,000 to a stranger in a litigation, half of which is contributed 2612
by the successful plaintiff in the case and the other half by the losing defendant, is, to say the least, a fantastic situation. The fantasy becomes completely ridiculous, however, when repeated emphasis is made of the fact that the $50,000 "contributions" were made in discharge of "some undisclosed claim or claims" (page 45).

It is because of this situation that this deponent desires to call attention to certain statements previously made by Mr. Avery, under oath, so that there may be introduced into the record the fact that Mr. Avery on several occasions heretofore did explain the reason underlying the Wille payment although in the present affidavit Mr. Avery 2613
repeatedly asserts that "we never have known the nature of the claim Wille was threatening to make."

Statements made in affidavit of Mr. Brainard Avery executed on August 11, 1938, and filed in Proceedings to Vacate Final Decree herein:

"About that time also deponent inquired of Mr. Hays whether he represented Wille and Mr. Hays replied that he did not but that he might be retained by Wille.

"Deponent then asked Mr. Hays what claim Wille made, or threatened to make, and Mr. Hays was very indefinite about it, and never made an attempt to or did give any explanation of the nature of any claim that was made by or might exist in favor of Theodor Wille (p. 41).

"No explanation whatsoever was vouchsafed to us as to the nature of this

Statements made in affidavit of Mr. Brainard Avery executed on April 22, 1932, and filed before the Surrogate for New York County in the Matter of the Estate of Hermann Sielcken, deceased, the pertinent part of which is annexed hereto and made Exhibit 1: "The prosecution of these claims ultimately resulted in:

"(1) A decree entered on December 30, 1929, in the United States District Court for the Southern District of New York in favor of the liquidation of Crossman & Sielcken against the Alien Property Custodian and Z. E. G. for $727,618.93, including accrued interest, which was paid, principal and interest, in April, 1930. The private banking house of Theodor Wille, of Hamburg, Germany, had in fact a joint one-half beneficial interest with Crossman & Sielcken in the claim aris-

threatened claim and we never have known the nature of the claim Wille was threatening to make (p. 42).

"In view of this threat of Wille to assert against Sielcken's assets in Germany some undisclosed claim or claims, we were absolutely insistent on having releases from Wille that would cover every possible claim that that firm could think of asserting. * * *

"Prior to the meeting of March 17th, 1930, and I think at Mr. Hays' office, on March 14th, 1930, a discussion ensued in
2615 the course of which it was stated by or on behalf of Mr. Hays that he could secure the execution of the desired release from Wille at a cost of $100,000. We have never known what claim Wille thought of asserting (p. 45).

"I explained to Mr. Bonynge, the American Agent, personally, this demand for $100,000 and our ignorance of what it was for, but that it seemed to me that it was worth while to contribute $50,000 to Mr. Hays, if Z. E. G. would, to see the settlement go through, even without knowing on what ground the claim was made, and that the settlement, with that $50,000 deducted, would still be within the authority to settle conferred on us by Mrs. Sielcken Schwarz. Mr. Bonynge
2616 adhered to the position shown in his letter of March 11th, 1930 (p. 46).

"We have never heard nor been informed in any way what the claim Wille proposed to make was, except the assertion in the most general terms, that if they did not get that $100,000 they were going to start litigation which would be embarrassing to the estate of Sielcken; whether that in Germany or that here they did not say.

"No claim was ever made by Theodor Wille that they were entitled to any part of the recovery from Z. E. G. under the judgment herein, but only that they wanted $100,000 to be paid them, half by the plaintiffs and half by Z. E. G." (p. 48).

ing upon the said Copenhagen cargoes, and, too, at the time of said recovery and because thereof, Z. E. G. was in effect asserting a substantial claim against Crossman & Sielcken by way of the estate of Hermann Sielcken, in Germany, by reason of a settlement that had been made during the period of the world war, with reference to said cargoes, between Z. E. G. and the executors in Germany of the Sielcken estate, undertaking to act in said matter.

"In order to work out a settlement of these conflicting interrelated claims existing between Z. E. G., the house of Wille and the estate of Hermann Sielcken, all finding their origin in the matter of the Copenhagen cargoes, a settlement was made between the said parties, whereby one-half of the aforesaid sum of $727,618.93 was paid to Z. E. G. in consideration of the release of its said claim and the sum of $50,000 was paid to the house of Theodor Wille in release of its said claim, so that out of said total sum recovered there was left to the estate of Hermann Sielcken the net sum of $313,340.70, subject to legal fees and expenses" (p. 39). (Emphasis supplied.)

Extract from direct testimony of Mr. Brainard Avery on examination by Mr. Selden Bacon in the Surrogate's Court for New York County, in the Matter of the Estate of Hermann Sielcken, deceased:

Before Walter W. Seligsberg, Esq., Referee; Vol. 4, pp. 1623-1624:

"A. (Continued) And Alex Sielcken had shown me that one-half of these cargoes was in the joint account and owned by Wille of Hamburg, a British enemy. I asked Mr. Warren if he could explain the discrepancy between the ownership being alleged by the American Government as entirely in Crossman & Sielcken, whereas the books showed that one-half of the cargoes were owned by a German enemy. I told Mr. Warren that theoretically, if Great Britain paid for the cargoes, that one-half of that recovery must, on the face of things, be remitted to Wille, a German enemy; that I had been informed in Washington that theoretically it was an international crime." (Emphasis supplied.)

Mr. Avery's affidavit contains the following statement on page 49:

> "None of us had at any time any thought of arranging to get money out of the Treasury of the United States or from the Alien Property Custodian on the basis of getting a consent recovery in this suit on the basis of dividing up the proceeds with Germans. What we were compromising with Z. E. G. was simply the outside claim under the indemnity agreement that had been signed by the German executors, a claim which we regarded most seriously despite the opinion of Dr. Neumann, a copy of which is hereto annexed, marked Exhibit C." 2618

Attention is further invited to the testimony of Mr. Avery, taken in January of 1935, before Referee Seligsberg in the Matter of the Estate of Hermann Sielcken, deceased, Surrogate's Court for New York County, where the following appears (Vol. V, pp. 1660-63) (see Exhibit T of this deponent's main affidavit):

> "Q. Will you proceed with your narrative, please, as to what you did after the successful termination of the trial? A. In January, the arrival of counsel for 2619
> the German Agent brought notice to me of the beginning of conferences in Washington looking to the arrival of the German Agent himself, Von Lewinski, and there were several of those meetings in Washington at different times, leading up to the performance of the tentative agreement for fifty-fifty settlement arrived at in Berlin in April, 1928.
>
> Mr. Bacon: That was first recommended at sixty-forty, was it not, and then afterwards fifty-fifty?
>
> The Witness: Yes. We tried to get sixty for the estate.
>
> Mr. Bacon: If I may interject here, after Von Lewinski came to Washington, sixty-forty was recommended by him; that was the subject of discussion, was it not?
>
> The Witness: Yes, there was a discussion about the

2620 rate of exchange of the German Mark, which would have resulted in an increase to sixty per cent from fifty per cent. Dr. Von Lewinski said that he remembered that the judgment of Solomon had been agreed to in Berlin of dividing the baby.

Mr. Bonynge attempted to get a larger net result by using a different rate of exchange in the settlement. Von Lewinski's reply was that he thought he had a gentlemen's agreement, but he was not certain what a gentlemen's agreement with a lady meant.

2621 Finally, it went through exactly as it was arranged in Berlin.

The Referee: When you say sixty-forty and fifty-fifty, you refer to some liquidated amount, half of which was to be paid in settlement?

The Witness: Yes. We had to reduce the Marks to dollars, and much would depend upon what rate of exchange was used, as to whether, in returning to the estate and to Crossman & Sielcken in liquidation—what they got in dollars.

The Referee: There had been an agreement, then in Berlin on an amount of Marks that was due somebody over here?

2622 The Witness: Not quite. The agreement was that right straight through, there should be an even division, even extending to the moneys in possession of the A. P. C.

The Referee: Even division between whom? That is what I cannot get into my head.

The Witness: The estate was to take one-half and the Germans were to get the other half, or to be released from the other half of the—

The Referee: In other words, there was to be an agreement on the claim, and the German Government was claiming either 60 per cent or 50 per cent?

The Witness: Or to receive 50 per cent because they received one-half of this Z. E. G. money which came from the A. P. C., and they paid one-half of the settlement which was necessary to make with the house of Theodor Wille."

Attention is called to the affidavit sworn to on the 30th day of July, 1938, by Mr. Orrin R. Judd, wherein Mr. Judd stated, in speaking of the period from May 1925, to 1935, when he was in primary charge of all matters affecting the Sielcken estate and the firm of Crossman & Sielcken for the Irving Trust Co.:

"That at no time during that period was any claim ever made to this executor or to any one connected with it so far as deponent ever heard, either by the firm of Theodor Wille of Hamburg or by the firm of Theodor Wille of Santos, South America, or any one 2624
in their behalf, that either of those firms had any interest whatever in any sum that might be recovered on behalf of the said firm of Crossman & Sielcken from any purchasers of what are known as the 'seized cargoes' as to which the above-entitled suit was brought in this Court.

"No explanation was ever made to us or reported to me or to the Trust Company of the basis on which the firm of Theodor Wille made a demand in 1930, on the Zentral Einkaufsgesellschaft and the German Agent before the Mixed Claims Commission, for payment of $100,000 as a condition to its signing 2625
various papers required for the settlement of the two claims before the Mixed Claims Commission, and the claim of the Zentral Einkaufsgesellschaft for indemnity, and the payment of the judgment recovered in this suit.

"The first I ever heard of that demand was at a time considerably after the entry of the decree herein and, as I recall it, some time in March, 1930. At that time I had been informed by Mr. Avery that the negotiations with Dr. von Lewinski, the German Agent, had reached a conclusion that was satisfactory, both to the Zentral Einkaufsgesellschaft and to Mrs. Sielcken Schwarz, but that after such agreement had been reached in theory, which included also the settlement of the claim made by the Memorial filed against Wille, Dr. von Lewinski had stated that

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he was having difficulty about obtaining the required releases from Theodor Wille.

"After some negotiation, as I was informed by Mr. Avery, the German Agent had advised Mr. Avery that Theodor Wille would sign the releases if they got $100,000 and that the Zentral Einkaufsgesellschaft would contribute one-half of that amount if the claimants would contribute the other half."

This deponent assumes that the above statement is made by Mr. Judd in answer to the statement found on
2627 pages 13 to 14 of this deponent's main affidavit to the effect that the Memorial filed before the Mixed Claims Commission, List No. 6207, Docket No. 8304 (a copy of which is attached to the affidavit of Mr. Selden Bacon as Exhibit B), included therein an item of $177,104.48 which represented one half of the loss charged to Theodor Wille by Crossman & Sielcken on the cargoes which were seized and condemned by the British Naval Authorities and which cargoes were the subject matter of the instant suit in the United States District Court for the Southern District of New York.

In view of Mr. Judd's disclaimer in his affidavit of any
2628 knowledge of a claim by the firm of Theodor Wille to the effect that it had "any interest whatever in any sum that might be recovered" on account of the seized cargoes (page 2) this deponent calls attention to the Memorial above mentioned, filed with the Mixed Claims Commission on November 3, 1927, and sworn to and signed by Mr. Judd on October 26, 1927.

As an Exhibit to this Memorial (marked Exhibit 7, Schedule 5, page 3), there was filed with the Commission a copy of the dollar account "due Crossman & Sielcken from Theodore Wille," identified as "Reference Brazil Ledger J402-K 390," in which Theodor Wille is charged, under an item dated September 30, 1917, with "Half loss on Copenhagen cargoes" to the extent of $177,104.48. A copy of this account is hereto annexed and marked Exhibit 2.

Paragraph 14 (h) of this Memorial (attached as Exhibit B to Mr. Selden Bacon's affidavit) shows:

> "Due Crossman & Sielcken from Theodor Wille (Dollar Account) on Oct. 8, 1917, plus and minus appropriate debits and credits to July 2, 1921 (Ledger J. 402-K. 390) Exhibits 3 and 7, Schedules 5, 5-a, 5-b, 5-c) $296,950.00"

Paragraph 14 (i) of this Memorial shows an item due 2630
Theodore Wille from Crossman & Sielcken of $192,901.51 and a net balance due Crossman & Sielcken of $104,048.49.

And in the Brief submitted before the Mixed Claims Commission in support of this Memorial which Brief was signed by Messrs. Brainard Avery, Charles D. Hamel, R. S. Doyle, Jay E. Whiting and Earl B. Barnes, the following explanation of the above items is given on pages 48 and 49 thereof

> "There is included in this dollar account, as will be noted in Schedules 5 and 5-c of Claimant's Exhibit 7, the sum of $177,104.48 charged on the books of Crossman & Sielcken against Theodor Wille on 2631
> September 30, 1917, and representing one-half of the loss on Copenhagen cargoes shipped in 1915 and seized by the British Government, which loss is computed as follows:

'Feb.	27 per s/s	Hilding	$ 95,578.29
Mar.	23	Arkansas	48,686.81
"	30	Hellig Olav	28,105.99
Apr.	13	Gunborg	43,997.16
"	23	Indianic	53,471.41
"	28	Oscar II	83,625.87
			$353,465.53
May	26, Received for Cereals, S/S Oscar II		8,050.44
			$345,415.09

Add—Copenhagen Expenses paid by Theodor Wille	20,206.39	
Legal Fees London & N. Y.	14,533.47	
Interest to 9/30/17 at 5%	40,695.61	
	$420,850.56	
Less—Profits on (other) Cargoes	66,641.60	
2633	$354,208.96	
1/2 of $354,208.96 equals		$177,104.48'

"These are the same cargoes for which claim is made against Germany and the Zentral-Einkaufsgesellschaft in the Memorial for Claim pending before the Commission, List No. 636, Docket No. 8305. The total of that claim is for the following amounts plus interest:

"Amount of Invoice, Freight and insurance	$353,465.53
Amount of Commission	35,346.55
2634	$388,812.08
Less—Payment for Crackers and cereals on S/S Oscar II	8,050.44
Net Amount	$380,761.64

"In the event that the Commission allows in full the claim against Germany and the Zentral-Einkaufsgesellschaft as set up in the Memorial for Claim, List 636, Docket No. 8305, for $380,761.54 plus interest, the charge on this account against Wille (Schedule 5 of Claimant's Exhibit 7) in the amount of $177,104.48, representing cost of one-half the loss on Copenhagen cargoes, should be eliminated, and the respective accounts between the two firms adjusted accordingly."

The above extracts from the Memorial, from the exhibits to the Memorial and from the Brief filed in sup-

port thereof, clearly indicate that Mr. Judd and the Executor, as the claimant, must have been cognizant that the firm of Theodor Wille would unquestionably assert a claim for its interest in any recovery that might ever be made on account of the seized cargoes, since the Memorial signed by Mr. Judd contained full details of the charging against Wille, in favor of Crossman & Sielcken on its dollar account, of the item of $177,104.48 as being one half of the loss of these cargoes to be borne by Wille. It will be noted, also, that this Memorial included this charge against Wille on the "dollar account" claim in 2636
1927, which was several years after it was allegedly written off the books of Crossman & Sielcken.

Attention is invited to the affidavit of Mr. George E. Warren, sworn to on June 28, 1938. This deponent believes Mr. Warren to be under severe misapprehension as to a great many of the matters mentioned in his affidavit but this deponent considers it to be sufficient for the purposes of the present proceedings to answer only certain material statements which are contrary to the true facts, a correct presentation of which is essential to the issues presented by this Motion.

Such statements by Mr. Warren are 2637

> "No seizure of either the assets of the firm of Crossman & Sielcken or of the assets of Hermann Sielcken had been made by the Custodian. Nor had either said Sielcken or said firm been declared an enemy by the Custodian at any time prior to the death of said Hermann Sielcken (p. 5).
>
> "That * * * from the 25th day of January, 1918, the Trust Company ceased to hold the position of Agent for the Alien Property Custodian in holding possession of any assets of the firm of Crossman & Sielcken (p. 7).
>
> "Deponent further says that in the early part of the year 1918 there was considerable correspondence between the Trust Company, conducted on its part by deponent, and the representatives of the Alien Property Custodian and others, which very clearly

shows that at that time the property of the firm of Crossman & Sielcken and the property of said Hermann Sielcken was held by the executor of Hermann Sielcken and not by the Alien Property Custodian" (p. 7).

With reference to the above statements this deponent is unable to present a clearer and more comprehensive summation of the true facts regarding the seizure of the property here concerned by the Custodian after the determination by the various Government officials that
2639 the same was enemy owned, than that which appears in the brief submitted on behalf of the Irving Trust Company, as Executor of Sielcken's estate by Mr. Selden Bacon and Mr. Leonard Smith, filed in 1936 in the Surrogate's Court for New York County, before the Surrogate, in the Matter of the Estate of Hermann Sielcken. On page 41 of said brief, the following is stated

"AFFAIRS OF CROSSMAN & SIELCKEN IN 1917.

"In the meantime in this country as early as August 8th, 1917, the firm of Crossman & Sielcken was already by the American authorities regarded with
2640 suspicion as pro-German on account of Sielcken; and they at once proceeded to halt the firm's activities (S. M. pp. 3533-5, 4529, 4536). At that time the War Intelligence Board interfered markedly with the export business of Crossman & Sielcken by delaying issuing licenses to them for export, by which licenses alone their export business could be conducted (S. M. pp. 4535-6). For a short time this was confined to constant delay; but beginning in late August, 1917, or early in September *all* such licenses to that firm were refused (Ex. 10456, p. 3).

"On a further consultation with Mr. Paul Fuller of the War Trade Board, of which the War Intelligence Bureau was a part, it was suggested that if Nielsen and Sorenson would get the enemy interest of Sielcken out of the firm in some way, the War Trade Board would allow them to go on with the ex-

port business, and, apparently, ship the goods which Crossman & Sielcken had already ordered and which were accumulating on the wharves in New York.

"Nielsen came back to New York. He sought advice from Mr. Eugene Smith, who had for years been Sielcken's personal attorney. But Mr. Smith answered that he had no authority to speak for Sielcken in the matter. Not knowing to whom else to turn, Nielsen then inquired of Mr. King for the name of someone he could wisely consult with. King recommended Cornell. Nielsen and Sorenson went 2642
to see him on September 22 (S. M. p. 3460; Ex. 585, Entry of Sept. 22, 1917). The upshot of the conference was that Cornell then advised that the partnership had been brought to an end by the war (S. M. pp. 2371-2, 2429) and that it would be well for Sorenson and Nielsen to organize a new partnership in their own names, meantime proceeding to liquidate the affairs of Crossman & Sielcken. Nielsen and Sorenson acted at once on this advice and formed the firm of Sorenson & Nielsen, which, as far as possible, took over at cost the accumulated and accumulating goods which Crossman & Sielcken had ordered (on commission) for foreign houses and proceeded 2643
to get licenses to export them (S. M. pp. 3536-3539).

"The Trading with the Enemy Act went into effect on October 6, 1917. Two days later unknown to anyone here, Sielcken died in Baden Baden. Immediately afterwards Mr. A. Mitchell Palmer was appointed Alien Property Custodian.

"As we all know, the provisions of the Trading With the Enemy Act made anyone residing in Germany an alien enemy, irrespective of nationality, and required prompt and full reports of property of any such enemies to the Custodian.

"Under date of November 7th, 1917, Nielsen and Sorenson reported the situation as fully as they knew how to the Custodian (Ex. RR), and in the hope of gaining favor with the Custodian deposited $100,000 firm funds with him, which was immediately invested

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by him in Liberty Bonds. This trust was Trust No. 1 of the Alien Property Custodian's office (Exs. D and U).

"Nielsen and Sorenson succeeded in getting various permits from the War Trade Board and finally, on November 16, 1917, the War Trade Board issued to them a permit to continue to do the business, of Crossman & Sielcken.

'as may be necessary for the sale, liquidation and disposition of the interest of the said Herman Si-
2645 elcken in the business, assets and property of the said firm of Crossman & Sielcken' (Ex. F).

That license, however, contained the following conditions:

"1st. That liquidation should be carried out under the supervision of Arthur Young & Company, as Certified Public Accountants, and under such additional supervision and in accordance with such plan and method as might be desired by the Alien Property Custodian; and that all expenses of such supervision should be paid as part of the expenses incidental to the liquidation;

2646 "2nd. That the licensees should turn over to the Alien Property Custodian the share of the 'enemy partner' in that firm (Sielcken) of such proceeds of the liquidation, either at its termination or from time to time during its course, as the Custodian should desire;

"'3rd. That the progress of the liquidation should be reported to the Alien Property Custodian and the War Trade Board monthly, or oftener if required; and

"'4. That the license was revocable and subject to amendment in the discretion of the War Trade Board.'

"APPOINTMENT OF THE TRUST CO. BY THE ALIEN PROPERTY CUSTODIAN.

"In the exercise of this supervision, the Alien Property Custodian, on November 30, 1917, appointed the Columbia Trust Company as his agent to represent him in that liquidation. In that letter (Ex. B of Answer of the Irving Trust Company; Ex. H in evidence), the Custodian notified the Columbia Trust Company;

"'All of the expenses of supervising the liquidation are proper charges against the trust, as you will see by the license. I shall be glad to talk over with you the amount of your compensation after you have had an opportunity to acquaint yourself with the details.' 2648

"Besides other details, he added:

"'There should be prepared immediately a statement of the assets and liabilities as of close of business this date, so that there may be had a statement showing the assets that I may be charged with the supervision of, which will be a basis of the Alien Property Custodian to account from to the enemy partners. 2649

"'In order that the Custodian may be in a position to properly account for the assets and justify the liquidation, all of the books, papers and records of this Company must be retained and finally placed in storage, so that access may be had to them at the time of the accounting at the close of the war.

"'Will you please see that this is done' (Ex. H).

"At the time of receiving this letter from the Custodian, the Trust Company had received a rumor, as yet unconfirmed, that Sielcken had died; and the Trust Company's President, Mr. King, knew that it was named as executor in Sielcken's will.

"The Trust Company accepted the appointment and as a very first step took into its own possession,

as representative of the Custodian, all the securities held by the firm; changed the combination on the firm's safe to one known only to itself; and had the principal account books of the corporation locked up in that safe nightly.

"The Trust Company acted under this appointment until January 23, 1918, a matter of nearly eight weeks.

"APPOINTMENT OF THE TRUST CO. AS TEMPORARY ADMINISTRATOR, PROBATE OF THE WILL, AND GAINING POSSESSION OF THE ASSETS.

"About the 14th of December, 1917, confirmation was received of the death of Sielcken (Exs. 10120, p. 6 aff. of Pet'r 10421). The Trust Company then secured the will from Nielsen, who had had possession of it (S. M. pp. 3672-3) and employed Eugene Smith to present the will for probate.

"It was deemed important to get the property out of the hands of the Alien Property Custodian at once, if possible, and an application was immediately made for the appointment of the Columbia Trust Company as temporary administrator of Sielcken's estate.

"The decision of this Court to appoint the Trust Company as temporary administrator was filed on December 26, 1917, and the same day Mr. Warren, on behalf of the Trust Company, wrote to the Alien Property Custodian suggesting that as the executor was not an enemy the entire property of Crossman & Sielcken ought to be turned over to it as temporary administrator (and subsequently as executor) for administration (Ex. 246).

"Meantime, the Alien Property Custodian had authorized a settlement with Sorenson and Nielsen at about $120,000 apiece for their shares of the profits of Crossman & Sielcken, as provided by the copartnership articles, and that settlement was concluded on the 27th day of December, 1917.

"On January 3, 1918, the Alien Property Custodian's representatives, Mr. Bower and Mr. Mann, were disposed to approve the turning over of the estate to the administrator (and executor) (Ex. 10381). On January 9, 1918, this was approved by the Alien Property Custodian in person in conference with nine of his assistants (Ex. 247), and on January 14, 1918, Mr. Bower, the Custodian's general business manager, wrote to the Trust Company, authorizing it to take possession of all the assets of Hermann Sielcken as of the date of his death, 2654
as administrator (and executor) to account for them thereafter in due course of administration, adding, however:

"'It will, however, be necessary for you to obtain a license from the War Trade Board authorizing you to take over and manage the estate of said Sielcken as such administrator and executor.

"'A statement of the assets and liabilities of the firm of Crossman & Sielcken as of September 30, 1917, was prepared by Arthur Young & Co. under the direction of this Department, which statement, for the purposes of liquidation is satisfactory to this Department. This statement is 2655
to be continued down to October 8, 1917, the date of Mr. Sielcken's death, for the purpose of establishing the value of the estate taken over by you.

"'The settlement made with the surviving partners, whose interest terminated upon the dissolution of the firm, is approved.' (Ex. F of Answer of Irving Trust Company; Ex. J. in evidence.)

"The required permission from the War Trade Board was issued January 21, 1918, and reached the Trust Company on the 23rd of January, 1918. One of the conditions of that license was

"'That any money or property now or hereafter held by said licensee, which any "enemy" or "ally of enemy" would at any time or times be

entitled to receive if he were not an "enemy" or "ally of enemy" shall, at such time or times, either upon or without demand therefor, be conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian whether or not so required by the President or by the Alien Property Custodian.' (Ex. G of Answer of Irving Trust Company; Ex. G in evidence.).

"Upon receipt of this license perfecting the authorization to take the property as temporary ad-
2657 ministrator, the Trust Company as administrator took over the property of Crossman & Sielcken at once.

"The fee for the Trust Company's services as representative of the Alien Property Custodian from November 30, 1917, to January 23, 1918, was fixed by agreement with the Alien Property Custodian at $7500 (S. M. 5122) and was promptly paid to the Columbia Trust Company out of the assets of Crossman & Sielcken on January 25, 1918 (Ex. 10493, S. M. pp. 5098-9).

"CONDITION OF THE FIRM ASSETS 1917-1919.

2658 "The situation of the firm owing to the war conditions had been very serious. During the refusal of the licenses by the War Trade Board, nearly $300,000 of goods adapted only to foreign markets, for which they had been specifically ordered, had been piling up on the piers in New York. And more were coming (S. M. pp. 3536-3538). Upwards of $890,000 was owing to the firm from concerns in hostile countries (Ex. 15, Sched. 1, p. 4) and about $1,716,000 from concerns in allied or neutral countries (Ex. 15, Sched. 1, p. 4) with whom the firm was permitted to communicate only under permits from the War Trade Board.

"There were a number of large claims against the estate. There were also about a quarter of a million dollars in the way of claims by the estate

which were contested by the debtors. Still other claims were doubtful.

"Within a month after the executor went into possession of the property the Alien Property Custodian, in person, demanded of Mr. Warren that they proceed to sell all the Woolson Spice stock (which constituted the largest single item of assets) without delay, as enemy-owned, saying the government desired to wipe out these enemy holdings in American corporations (S. M. pp. 4621, 4624-5, 4967-8).

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"Under the extraordinary circumstances and in view of the extraordinary complexity of the estate, the executor, in the face of the war conditions, had in 1919 made a marked success in realizing out of the stranded wreck of this once prosperous business.

"It had by tact and skill gotten the administration of the firm assets out of the hands of the Custodian, who had actually seized them, and so avoided the possibility of sacrifice of the assets thereby. Despite the war conditions the executor had succeeded in realizing well over $450,000 on the $892,091.53 owing to the firm from enemies (Ex. 15, Sched. 2, p. 3). * * *.

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"In October, 1918, the Alien Property Custodian had served a formal demand, dated September, 1917, on the executor for all the interests in the estate of Mrs. Sielcken and of the German executors and all other German legatees under the will, declaring them each enemies and so vested himself with all their rights (Ex. D). Prior to that service the Custodian's claim thereto was fully protected alike by the injunction in the decree admitting the will to probate, referred to in the letters testamentary (Ex. 10097) and by the conditions of the licenses from the War Trade Board. * * *

"'You will be glad to know, that in spite of the many complicated situations that confronted us in administrating his estate, we feel that the

result has been highly satisfactory. The conditions that existed during the war of course made it impossible for us to feel certain what course should best be pursued in liquidating the estate, but you may be sure that we gave to every item the most careful consideration.

"'As you no doubt know, the Alien Property Custodian served notice on us that the entire estate came under his jurisdiction, and that we should be required to account to him' (Ex. 180).

2663 "In late June, 1919, the text of The Versailles Treaty, which Mr. Wilson had signed on behalf of the United States, was published in New York. Among the terms of that treaty were provisions for the permanent retention by the United States of all property of enemies seized by the Custodian (*Vide* Ex. 91).

"The petitioner was, as matters then stood, unquestionably an enemy within the terms of the Trading with the Enemy Act."

(By petitioner Mr. Bacon refers to Clara Sielcken, widow of Hermann Sielcken.)

2664 In the affidavit of Selden Bacon, Esq., dated the 12th day of August, 1938, filed herein, Mr. Bacon states, on page 3:

"Until the present motion was noticed, the deponent never had occasion to inquire into the exact nature and details of the compromise agreement under which such payments were made."

And further, on page 4:

"And it is only since the present motion was first noticed by the United States that the deponent has been able to inquire of them into the very complicated details of the prosecution and settlement of those Memorials and of this suit."

In the "Brief for Irving Trust Company as Executor of Hermann Sielcken, Deceased," filed in February, 1936,

in the Surrogate's Court, New York County, in the Matter of the Estate of Hermann Sielcken, Mr. Selden Bacon and Leonard B. Smith, Esq., Attorneys for the Irving Trust Company as said Executor, make the following statement, in reference to the instant suit and the claim for $1,000,000 before the Mixed Claims Commission, United States and Germany, at page 223 thereof:

"The abandoned allegations of the petition are emphatic proof of the extent to which Avery exercised his imagination. In particular we may notice the allegations as to the $1,000,000 remittances of 2666
1916. The theory that those remained firm assets was flatly contradicted by the very documents he asserted gave him the idea (Exs. 10092, 10117).

"The petitioner herself had repeatedly sworn that the contention was untrue (Exs. 10093, 10094, 10210), and had herself taken the proceeds of those remittances as individual German assets of Sielcken, with which neither the firm nor the American executor had anything to do (S. M., pp. 3033-4). The whole matter of the assertion of that claim before the mixed claims commission and its compromise was avowedly conducted by Avery and the petitioner (Amended Petition, pp. 38-9). And he had found the German 2667
Government quite ready to agree to a compromise which cost it nothing and gave to the German Government out of the United States Treasury over $300,000 of cash of Z. E. G., a German governmental subsidiary, which the United States had seized and held."

In the same brief, at page 176, an elaborate explanation of the theory upon which Mr. Brainard Avery filed a claim before the Mixed Claims Commission for $1,000,000, as an asset of the firm of Crossman & Sielcken, is given as follows:

"a) The Story Told Up To 1927.

"In the fall of 1919 and the first months of 1920 Mrs. Sielcken was, of course, very anxious to get

into the good graces of the American Government so as to induce a voluntary return of her own property and her share of this estate to her, by the Alien Property Custodian without formal application (S. M., pp. 5326-7). It was while she was urging such a voluntary return that she became an important witness for the Government in the prosecution of Rumely.

"We have already seen how Sielcken in 1915 received a personal legacy from George W. Crossman of $1,000,000 which was credited to him on the firm books at the time, and that, in late 1916, he had the firm send the $1,000,000 to Wille for him, and that it was credited to his personal account with Wille and invested in German war bonds which he and the petitioner took, and which appeared on the books of Crossman & Sielcken as a withdrawal by him of so much capital from the firm.

"In that *Rumely* case she was examined beforehand by the Assistant District Attorney, Mr. Harper, and then made affidavit about these $1,000,000 remittances as follows:

> "'It is my understanding that the large amount of money which my husband had sent to him in (from) New York and which he invested in German Government bonds was substantially a legacy of $1,000,000 which he received as a legatee under the will of his partner, Mr. Crossman, and after the payment of this legacy, this money at my husband's suggestion was sent over to him and invested in these bonds and we lived on the interest of them.' (S. M., pp. 2914-2915.)

"At the trial of the *Rumely* case she testified more specifically as follows:

> "'At that time (September, 1916) Mr. Sielcken had two bank accounts in Germany. One bank account was the firm of Theodor Wille, in Hamburg, and one Bank account in Baden-Baden, the Rhein-

ische Credit Bank. The account at the Rheinische Credit Bank in Baden-Baden was used for the purpose of expenses of the estate. That is the expense of our living at the House Eden, the maintenance of our establishment there. The balance carried was sufficient to meet that from time to time. It was sent over by check from Theodor Wille, to the Rheinische Credit Bank. My husband had an account with Theodor Wille at Hamburg. I do not remember what the largest amount was that was deposited in that account. Other than those bank accounts, he had no property in Germany that I know of before 1916, in the spring. He sent some money from his office here and invested it in Germany. In 1915, so far as I knew, Mr. Sielcken had no property in Germany, other than those two bank accounts. During 1916, Mr. Sielcken sent over for some money to purchase bonds. I knew about it. I am the residuary legatee of Mr. Sielcken's will. I have those bonds today. They are in Hamburg, in the Discounto Bank, under the care of Theodor Wille. Those are bonds that were purchased with a million dollars that was sent over from Crossman & Sielcken in New York. Those bonds have never been pledged to anybody. I think they were purchased in the spring of 1916. Up to the time of the purchase of those bonds, the only property that Mr. Sielcken had in Germany were those two bank accounts.' (Ex. 10210 for Id., p. 5.)

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"She further there testified:

"'These bonds that he purchased in 1916, the German Government bonds, with the million dollars; I did not come into possession of those until after Mr. Sielcken passed away. *They were his individual property from the time he purchased them until after his demise.*' (Italics ours.) *Ibid,* page 8.

"And again, the following day, she added:

"'Q. You testified yesterday, Mrs. Sielcken, with respect to one million dollars which, at Mr. Sielcken's request, was remitted to him by the firm of Crossman-Sielcken, and which was invested in bonds of the German Empire. Do you know for what purpose the income of those bonds were used? A. Yes, sir.

"'Mr. Steuer: I object to that as immaterial.

"'The Court: Overruled.

"'Mr. Steuer: I except.

"'The Witness: For what purpose was the income of those bonds used?

"'Q. Yes. A. *The income of those bonds were used for our living over there. Mr. Sielcken had no property in Germany—investing this million dollars which he had from Mr. Crossman over there to have an income, and to be able to pay the expenses, which we were always drawing,* as we stayed over there longer. We only used to stay two or three months before that time. That is why he invested that money over there in bonds, and I am still paying from it over there.

"'The income on those bonds was remitted from Hamburg and that was expended as we needed it from time to time for our living expenses in House Eden.'

"*Ibid,* pages 4-5.

"At the time of giving this testimony Mrs. Sielcken was quite clear that that $1,000,000 was the Crossman legacy. She was positive that, when sent to Sielcken, it was *his individual* property; that it was put in *his personal bank account;* that the bonds bought with it were *his individual* property; that he got the $1,000,000 sent over to him so *he* should have funds in Germany to pay his personal expenses; that the income from the bonds was used for those pur-

poses, first by him, and then by her; and that she later got the bonds herself and then still held them.

"In February, 1921, she in substance repeated this story in connection with her efforts to reduce the Federal Estate tax on the estate, making affidavit as follows:

"'The only personal property left by said decedent (Hermann Sielcken) in Germany, or elsewhere outside of the United States, to the best of my knowledge, information and belief, was the following: 2678

"'German Government Bonds	5,432,000M.	
Less loan from Theodor Wille, Hamburg	200,000	5,232,000M.
"'Loan to M. Moller, Altona, Germany		100,000
Household furniture and personal effects		400,000
Total		5,732,000M.

"'The foregoing valuations are in German marks. The par value of the German Government bonds was 6,790,000 Marks, but at the time of Mr. Sielcken's death their market value was about 80%, or 5,432,000 marks.' (Ex. 10093.) 2679

"This was supplemented by further affidavit of May 18, 1921, as to the value of Mariahalden. (Ex. BB.)

"Mrs. Sielcken claimed in the first of these two affidavits that the Mark should be figured at nine cents. The Revenue Bureau figured the Mark at 14 12/100 cents. And on the sum, so ascertained, as the value of Sielcken's German estate, to wit, $1,171,771.74 based a rebate of $113,294.34, representing the tax paid on a proportionate part of the estate's indebtedness (Ex. CC).

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"No estate tax or transfer tax was imposed on these foreign assets, *because Sielcken was a non-resident.*

"The importance to her of showing that he was domiciled in New York had largely disappeared for her immediate purposes, when she secured the California decree of January 6, 1921, establishing a record of Sielcken's naturalization (Ex. 10120—paper 1) and when in April, 1921, the Alien Property Custodian surrendered his claim. The saving in Estate and Transfer taxes she accomplished by the shift in
2681 her representations was over $110,000.

"The material feature of this situation is: That if these 1916 remittances remained *firm* assets of Crossman & Sielcken, they belonged to the Trust Company as executor, and were subject to both estate and transfer taxes here. Whereas, if they were *individual* assets and *not* firm assets, and he died domiciled in Germany, these bonds did not pass to the American executor, which was executor only of the American assets (which necessarily included the entire interest in Crossman & Sielcken), and were not subject to either Estate or Transfer taxes here.

2682 "These 1921 affidavits, by which a rebate of $113,294.34 was secured from the *Estate* tax alone, (See Exs. 10218, CC), were thus direct representations by her:

"a) That Sielcken died domiciled in Germany;

"b) That the $1,000,000 remittances of 1916, became, on remittance to Wille for him, Sielcken's *individual* property and were *not* firm assets.

"The books of Crossman & Sielcken showed the receipt, for Sielcken's account of the Crossman legacy under date of January 15, 1915, in the sum of $1,100,000 (Ex. 10092).

"This legacy from Crossman, by the terms of the partnership articles (Amended Petition, p. 68), was clearly not a part of the capital of the 1913 firm of Crossman & Sielcken, but was merely a personal

credit to Sielcken, on the firm's general account with him.

"When the $1,000,000 was remitted to him in the fall of 1916, the remittances were charged against him in that same account (Ex. 10092).

"These remittances, when received by Theodor Wille, were *not* credited to the firm of Crossman & Sielcken but to the *personal* bank account of Sielcken with Theodor Wille (Exs. 8 and 10120—paper 15, p. 3).

"That personal bank account of Sielcken's did *not* 2684
appear on the books of Crossman & Sielcken as a firm account. There was nothing on the books here relating to his personal transactions with Wille (Ex. 10090).

"If that personal account of Sielcken's with Theodor Wille had been a *firm* account, all receipts on it would have had to be credited to the firm, including the $1,000,000 remittances, the interest on the eight million marks of bonds, and the 4,000,000 marks of other receipts thereon. And all Sielcken's withdrawals from it, consisting of his entire household expenses in Germany and other matters aggregating about 5,600,000 Marks would have had to be charged 2685
to Sielcken on the firm books of Crossman & Sielcken. The results of such entries would obviously have been disastrous to the petitioner's claim that Sorenson and Nielsen had been overpaid; for (even omitting from that calculation the item of increment of value of securities), their shares of the profits would in that case have been far larger than the sums actually paid them.

"But there were no entries on the books or papers in the files of Crossman & Sielcken even tending to show anything about what Sielcken did with this money after it was sent to him and charged against his balance of capital in the firm (Ex. 10090). And he and the petitioner used it, and she took the bonds bought with it, as individual property of Sielcken's not belonging to the firm.

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"Mr. Avery claimed (S. M., pp. 1748, 1814) that there had been delivered to him by Sorenson in 1927, papers which showed that the withdrawal of the $1,000,000 in the fall of 1916 had *not* been charged up to Sielcken as a withdrawal of the sum by him from the firm assets. He was immediately called upon to produce all such papers (S. M., p. 1749). Every paper he so produced was put in evidence (Exs. 10103-10119, 10124-10126). In no one of them was there the slightest indication to support his statement. The books of the firm showed the direct charge of the
2687 amount against Sielcken's personal account, and no suggestion of any credit to the firm against *any* person for the sums so remitted.

"Finally, Mr. Avery produced Exhibit 10117, a balance sheet as of December 31, 1916, which he said was one of the papers so delivered to him by Sorenson, in which document it was stated *expressly* that Sielcken's net withdrawals of $1,012,410.03 in 1916, (which included the $1,000,000 remittances of that fall) had reduced Sielcken's 'capital' in the firm to $4,853,183.65, which was further reduced by the loss for the year 1916 of $96,422.36, to $4,756,761.29 (Ex.
2688 10117).

"*Instead of supporting his statement on the stand, the books and papers delivered to him flatly contradicted his statement.*

"Up to Avery's connection with the case Mrs. Sielcken had consistently maintained that the German bonds in which this $1,000,000 had been invested were Sielcken's individual property, and not that of the firm, and *therefore* not property within the United States, to which our Estate and Transfer Tax laws were applicable and by this contention had avoided both Estate and Transfer Taxes on that asset, which, at the time of his death, was worth, according to the Federal Tax Bureau $1,171,771.74 (Ex. CC). The Estate and Transfer taxes on that additional amount of American estate would have amounted to about

$140,000. These she escaped on the strength of her affidavit on those contentions. She had also taken the bonds bought with these remittances as *individual* property of Sielcken's, and used them for her own purposes (Ex. 10094 for Id. S. M. pp. 2914-2915), and had never mentioned them to the American Executor (S. M., pp. 3033-3034).

"Mr. Avery cabled his partner Mr. Castell on July 28, 1927:

"'Three We are maturing new theory viz. One, 1913 articles partnership Sielcke tracted to 2690.
supply definite capital. Partnership duly terminated Sielcken's death. Two. All money sent Sielcken including million fall 1916 charged his account here. He did not withdraw capital merely debit charge. Three All moneys possession Wille Hamburg at Sielcken's death were partnership funds subject accounting between partnership Sielcken. This Wille partners knew. Four. German executors Sielcken estate had no jurisdiction money credits securities Wille's possession because they belonged liquidators New York subject articles partnership liquidation partnership payment Columbia Trust as New York Executor. See Sielcken's will. Stop. Had German Executors taken 2691
possession Wille account prematurely both they Wille probably responsible to liquidators. Five. Martin advises under these circumstances probably German war legislation responsible for loss at sixteen cents mark. Claimants here Columbia Trust Sorenson sole liquidator. Six. Can you ascertain Sielcken records amount his personal balances Wille time of death. Seven. Probably no record here transactions between Wille Sielcken personally * * *' (Ex. 10090).

"It *was* an entirely *new* theory, and contradicted flatly by the books and records here, as well as by the testimony and affidavits of Mrs. Sielcken by which

she had escaped Estate and Transfer taxes aggregating over $110,000 and by her own dealings with those bonds and with the personal bank account of Hermann Sielcken (Ex. 10120, Docs. 15-18).

"The tax matter had been fully settled and disposed of in her favor by 1923.

"In 1927 Mrs. Sielcken, under Avery's guidance, proceeds to assert before the Mixed Claims Commission, that all these German War bonds purchased with the $1,000,000 remittances of 1916 belonged to *the firm* of Crossman & Sielcken, and *not* to Sielcken
2693 individually, and that Sielcken was domiciled all the time in New York.

"It was another complete *volte-face.* And Mrs. Sielcken bore her part in it. She made affidavit, on September 16, 1927, to support this claim as follows:

" 'When diplomatic relations between the United States and Germany were severed in February, 1917, both my husband, Hermann Sielcken, and I experienced much anxiety regarding our property interests in Germany. * * *

" 'After the funeral, on October 11th (1919), at Baden-Baden, there was a meeting, at the Villa
2694 Eden, which I had rented, as Mariahalden was not suitable as a residence during Mr. Sielcken's illness. At this meeting there were present myself, Mr. Gustav Diederichsen, Mr. Georg Georgius, my brothers Carl and Richard, Dr. Kammerer and my son, Alex. * * * At this meeting the question then arose as to what was Mr. Sielcken's estate in Germany. We all knew that his principal interests were in the firm of Crossman & Sielcken in New York. He had only a few unpaid bills in Germany—no debts except the large accounts of Crossman & Sielcken on the books of Theodor Wille at Hamburg. * * *

" 'Dr. Kammerer said the executors need not concern themselves about my husband's real estate. The only land he possessed in Germany was Mariahalden * * *.

"'He had a current bank account, at the Rheinische Credit Bank at Baden-Baden. I do not think he had any assets, or property anywhere else, except the large account with Wille, in which he was interested. * * * Mr. Diederichsen explained the account which was on the books of Theodor Wille in the name of Hermann Sielcken. He told us that this was a general account between his firm (Wille), Crossman & Sielcken and Mr. Sielcken; that Mr. Sielcken owned all the capital invested in Crossman & Sielcken; that the property with Wille was capital of Crossman & Sielcken, but that it was also subject to the debts of Crossman & Sielcken. * * *

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"'Reverting again to the meeting of the executors and myself at Baden-Baden following Mr. Sielcken's funeral, 1917, the executors decided not to take possession of the money and bonds and assets with Theodor Wille, at Hamburg. They told me this property was part of the Crossman & Sielcken capital, and subject to the liquidation of that firm (the firm had to be liquidated by Mr. Sorenson and Mr. Nielsen on Mr. Sielcken's death. This was provided for in his wills) and although I was interested in whatever remained of Mr. Sielcken's estate, after debts and taxes were paid, they decided to take no possession nor jurisdiction of the property with Wille, at Hamburg. And they never did. This decision was never changed, nor was there any later discussion as to changing it.'

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"(Paper 2 of Ex. 10120, pp. 1, 3, 4, 5, 8-9.)

"This affidavit was filed in the Mixed Claims Commission proceeding conducted by her, of which a compromise was subsequently arranged by Mr. Avery in 1930."

Mr. Bacon at the end of his affidavit says:

"deponent believes the account given by Mr. Avery in his affidavit herein, verified August 11, 1938, of

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the situation in regard to that compromise to be correct.''

At page 301 of the brief before Walter Seligsberg as referee in the above-mentioned proceeding in the Surrogate's Court, Mr. Bacon and Mr. Smith state:

''*As to the Unreliability of the Testimony of Brainard Avery.*

''We desire simply to point out a few of the many matters concerning the conduct and testimony of this
2699 witness, and shall leave them without comment. They speak for themselves.

''Mr. Avery, in open court before the Surrogate, claimed credit for having personally drawn the amended petition, and appeared as counsel for the petitioner.

* * * * * * *

''b). *The $1,000,000 remittances of 1916.*

''We ask the Court to examine carefully his testimony and the allegations in the Wille Memorial of
2700 1927 (Ex. 7) and in the amended petition (p. 27) that the $1,000,000 remittances of 1916 were still firm assets after their receipt in Germany.

''In his cablegram of July 28, 1927 to Castell (Ex. 10090) he stated that this was a 'new theory' he was maturing, and that there was apparently nothing in the books or files here that showed anything about Sielcken's personal transactions with Wille.

''In the amended petition (p. 27) he had alleged in substance, and tried to support it on the stand, (S. M., pp. 1742-1751, 1756-1758, 1768, 1770, 1813-1816, 1822-1823, 1827-1828, 1838-1841, 2045-2048) that he got the information, that this $1,000,000 remained firm assets, from books and papers of Crossman & Sielcken furnished him by Sorenson, and that those papers and the books showed that that $1,000,000

never was charged against Sielcken's capital in the firm.

"The ledger account with Sielcken (Ex. 10092) specifically showed these remittances as withdrawals from Sielcken's balance with the firm Ex. 10117, (a firm balance sheet as of December 31, 1916), produced by Avery and identified by him as one of the papers received by him from Sorenson, which he saw at the time of sending his 'new theory' cablegram (Ex. 10090) (See S. M., p. 1814) and on which he based his statement that the books and papers of Crossman & Sielcken nowhere treated these remittances as withdrawals of capital by Sielcken, *expressly* stated that the 'capital' of Sielcken in the firm had been *reduced* during 1916 from $5,865,593.68 to $4,756,761.29; that this reduction was occasioned by losses during that year of $96,422.36 and by the amount of $1,012,410.03 *withdrawn* during that year by Hermann Sielcken. 2702

"The firm Ledger Account with Sielcken (Ex. 10092) during 1916, showed these $1,000,000 remittances of 1916 in their exact amount as withdrawals by Sielcken, $ 999,453.14

"It showed other small payments made for Sielcken's personal account of $ 18,081.51 2703

Total $1,017,534.65

'It showed receipts for his account of $5,059.89

and 64.73 5,124.62

"Leaving net withdrawals $1,012,410.03, coinciding exactly to the penny with the sum shown in the balance sheet so furnished Avery by Sorenson as 'Drawn 1916 by H. Sielcken $1,012,410.03.' and reducing the 'capital' of the firm accordingly (Ex. 10117).

"Mr. Avery declared, on the stand (S. M., pp. 1815-1816) that he didn't know whether these figures

on Exhibit 10117 corresponded with the figures on the ledger account for 1916 and included those remittances. It had been his business to know just that.

"These documents established completely and conclusively that Mr. Avery got no such information from the books of Crossman & Sielcken and from the papers from their files furnished him by Sorenson, as he had asserted. Those books and those papers established that the information so given him
2705 was directly to the contrary of what he had asserted. And the 'new theory' he was working up, that the $1,000,000 remittances of 1916 were still property of the firm and *not* Sielcken's individual withdrawals from his capital in the firm, was purely an invention of his own, contradicted by every document he had access to, including Sielcken's personal accounts in Germany showing what he did with that money and what, after Sielcken's death, Mrs. Sielcken did with the bonds purchased therewith and the income therefrom—documents of which he filed copies with the Mixed Claims Commission in connection with the Wille Memorial of 1927 (Ex. 10120). The whole
2706 story was a concoction of a *'new theory,'* which the papers in his possession showed him was absolutely untrue.

"c). *Of the 1917 Settlement with Sorenson and Nielsen.*

"Again Mr. Avery, within a month after entering judgment in favor of his client, that the settlement of 1917 with Sorenson and Nielsen for their share of the profits of Crossman & Sielcken was *a full and complete accord and satisfaction* with them, barring their claims for nearly a quarter of a million more —a finding requested by himself (Ex. B)—turns completely around, and, without an iota of additional evidence, attempts to assert in behalf of the same client, and against the same persons, that it was *not* such an accord and satisfaction as he had just

induced the Supreme Court to adjudge that it was; and to assert that his client, having availed herself of it to defeat Sorenson and Nielsen's claims for additional amounts, could now attack it to show that they were originally overpaid.

"After the Referee had ruled that Mrs. Sielcken was absolutely estopped by that judgment to question that accord and satisfaction the charge was withdrawn."

Referring to Mr. Bacon's statement on page 4 of his affidavit that only since the filing of the present motion 2708
has he been able to inquire into the details of the prosecution of this suit, attention is called to the surprising familiarity of Mr. Bacon with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken. At page 187 of the said brief before the Surrogate, it is stated:

"A similar attitude was displayed by the petitioner in dealing with the Sorenson and Nielsen 1917 settlement. 2709

"In the Chase Bank suit she requested and got from the Referee, Mr. Wolff, the finding that the settlement of December, 1917, with Nielsen and Sorenson was *a complete accord and satisfaction of their claims to shares of the profits of Crossman & Sielcken* (Ex. B) sheltering herself thereby from claims appoximating $250,000. That judgment was entered on November 11th, 1933 (Ex. A) on motion of Avery & Whiting as attorneys for Clara Sielcken Schwarz.

"The ink is scarcely dry on that judgment, based on that finding which she had secured, entered by her own attorneys (Ex. A), before she turns around, using the same attorneys, and attempts to assert in this proceeding that that transaction *was not a complete accord and satisfaction of those claims and was not binding;* and to urge that the decree of July 8.

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1921 should be vacated so as to enable her to reclaim large sums from Nielsen and Sorenson, and also surcharge this Executor with heavy damages for having ratified that accord and satisfaction, which she had just asserted and found so useful.

"That is a similar shift of story to accommodate her new financial desires, and bears on the weight to be given to any testimony given by her.

"It is Mrs. Sielcken, who, contrary to the advice of her attorneys, decides on employing Stewart to

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try to get the value of the seized cargoes from the British Government on the ground that the seizure was improper because there was no German interest in the cargoes.

"On the other hand, she had in her possession in Baden-Baden, at the time, the long correspondence between Sielcken and the Reichs Einkauf Gesellschaft and its successor Z. E. G. (S. M., pp. 4306-16).

"She suppresses completely from the Columbia Trust Company all information on that subject. She, through her son and Avery, gets up in 1927 the idea of proceeding *against Z. E. G. and Germany,* through the Mixed Claims Commission and the suit in the

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District Court, to recover the price of those cargoes from the vendee. She and her son despatch Mr. Castell from New York to Europe to her files and those of Dr. Kammerer, to get these papers. And he finds them there galore (Ex. 10213, Documents Nos. 1-12 and accompanying affidavits of Castell).

"Castell wasn't sent on a 6000 mile trip on the bare chance that there *might possibly* be something there. Before Castell went, (but after Avery had been retained by her) young Sielcken on May 6, 1927, for the first time, reveals to Judd, that they *have reason to believe Z. E. G. was the purchaser* (Ex. JJJ). She had had ample reason to know that long before Stewart was employed.

"There had been litigation over it in Germany in 1918 (Ex. 10088) and Kammerer had represented the

German Executors in that litigation. Castell got some of those papers from Kaemmerer's files. S. M., p. 4308). How came he to look for them there? Is it credible that she knew nothing of litigation involving nearly half a million dollars, in which she was directly interested, which was conducted by her own attorney, though in the names of the four German executors, namely, her two brothers, Diederichsen, her chief adviser and confidant, and his partner Georgius? Or that they undertook to bind the estate to payments running into hundreds of thousands of dollars without her knowledge? Or that she nevertheless knew in 1927 where to send Castell to get those papers? 2714

"Even aside from all that, her own oral testimony indicates that *she* knew as far back as 1916 that Z. E. G. had been the purchaser (S. M., pp. 3279-3282).

"Unless she had known of the details of that transaction as early as 1916 how could she recall in 1935 that she heard Sielcken mention Z. E. G. to Nielsen in 1916 (S. M., pp. 3279-3282); or that she heard Nielsen in 1916 say to Sielcken that he had seen Jorgensen or Paulsen (S. M. pp. 3279-3282)? If she had not known the details of the transaction at the time, the names of Jorgensen and Paulsen, and even the name of Z. E. G. would have been mere names to her—not to be remembered as having been casually overheard nineteen years before, with no reference to why or in what connection they were used. The testimony she gave may well have been quite inaccurate, but none the less it is *her* testimony and it admits her knowledge of Z. E. G.'s interest in those cargoes, long years before the employment of Stewart. 2715

"That knowledge of hers may well explain why *she* was willing to go out and pay Stewart $10,000 plus $2,000 to his attorney in settlement of the Stewart action, which, as far as the executor was concerned, was clearly baseless.

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"She charged Nielsen *after he was dead,* with having known that Z. E. G. was the purchaser (S. M., p. 2997); but on being more closely questioned admitted that *all* he said was to ask her what about Z. E. G. but no details were mentioned (S. M., p. 2997). Later she said all she could recall that he said was that it was a pity the cargoes were seized. It made lots of trouble (S. M., pp. 3154-3155). Later, after several days, she asserted that Nielsen had asked her, in 1919, only whether Z. E. G. still existed (S. M., pp. 3283-3284). Sielcken's own contemporaneous letter of September 22, 1914 showed that he was extremely careful *not* to reveal to his partners anything about the connection of the Reichs Einkaufs Gesellschaft of Z. E. G. with the purchase of the seized cargoes (Ex. 10103).

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"After being forced to admit that her statement that Nielsen, in 1919, told her about Z. E. G. was incorrect, she, in 1935, asserted that she heard Nielsen, in 1916, discuss with Sielcken, both Z. E. G. and its agents Paulsen and Jorgensen, and heard Nielsen say he had been to see them (S. M., pp. 3279-3282), a curious time to recall such talks, distinctly reminiscent of Judge Sanborn's comment on the earlier and later stories of a witness similarly situated.

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"*Curtis* v. *Cutler,* 76 Fed. 16, 20-21.

"The attempt to foist this knowledge onto Nielsen after his death, over her own prior testimony, is also a most apt commentary on her laches in bringing this proceeding.

"The proofs of her double dealing in this particular matter are not as categorical as in the first three cases, but they are tolerably complete. It makes a fourth important instance of her representing one thing to gain one end, and of turning around later and making contrary representations to gain another."

The petition for intervention of the Irving Trust Company, as Executor of Hermann Sielcken, the affidavits filed herein by or on behalf of the Chase National Bank, as Ancillary Executor of the Estate of Thorleif S. B. Nielsen, and the affidavit filed herein by John S. Sorenson, show that neither John S. Sorenson nor Thorleif S. B. Nielsen, or his Ancillary Executor, received any of the moneys recovered from the United States in the instant suit. Exhibit A annexed to the affidavit of Mr. Bacon, being a copy of the Intermediate Account of Proceedings of the Executor, shows the disposition of the proceeds of the recoveries in the instant suit and before the Mixed 2720
Claims Commission, and at page 54 the knowledge of the interested parties that "*there was most serious question* whether it was not reversible error as to the right of Sorenson & Nielsen to maintain the suit as plaintiff."

The statements of Mr. Bacon and Mr. Smith in the same brief shed much light upon the status of Hermann Sielcken as an alleged citizen of the United States and as an enemy within the definition of the word "enemy" in the Trading with the Enemy Act, at page 11, wherein it is stated:

> "Hermann Sielcken, the decedent, was born in Hamburg, Germany, about 1840. He came to the 2721
> United States about 1870, lived for a few years in California, and then came to New York, where he became connected with the firm of W. H. Crossman & Bro. After some years W. H. Crossman died. A firm was formed under the name of Crossman & Sielcken, consisting of George W. Crossman and Hermann Sielcken, as substantially equal partners. This firm continued until January 15, 1913, when George W. Crossman died. Hermann Sielcken then continued the business of the firm alone, under the name Crossman & Sielcken, until June 2, 1913. Then a new firm was formed consisting of Hermann Sielcken, Thorleif S. B. Nielsen and John S. Sorenson under the articles of copartnership set out as Exhibit A of the Amended Petition. These dates in 1913 are important features of the case.

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"Prior to the formation of that partnership of June 2, 1913, both Nielsen and Sorenson had, for many years, been important employees of Crossman & Sielcken, Nielsen chiefly in attending to their import business (S. M. p. 3752), and Sorenson chiefly as office manager, head of the bookkeeping department of the business and taking care of the financing (S. M. pp. 3666-3667).

"When the petitioner came to the United States in October, 1919, she asserted that Sielcken had been naturalized in California in 1875 as an American
2723 citizen, and had lost his citizenship papers in a shipwreck; but there was no record of any such naturalization to be found there (Ex. 439). And the Alien Property Custodian, until 1921, denied that Sielcken ever had been naturalized here."

And again at page 34 of said brief, where it is stated:

"SIELCKEN'S PERSONAL HISTORY AFTER JUNE 2, 1913.

"We return to *the story of* Sielcken's life after organizing his 1913 partnership.

"He left New York shortly afterwards for Ger-
2724 many and there in the following September (Ex. 10101) married the petitioner, who was, prior to her marriage to him, a German subject (Ex. 439, pp. 1 and 2).

"At that time, he apparently determined to take up his permanent domicile in Baden-Baden, Germany, for in the marriage certificate as well as in other subsequent German documents, he describes himself as both temporarily and permanently a resident of that city (Ex. 10101), where he owned a great establishment, named Mariahalden (See also Exs. 10095 B, paper L-1).

"Shortly after his marriage he came to New York with his wife and they spent the ensuing winter at his old suite at the Waldorf-Astoria, which he continued to retain.

"In the spring of 1914 he and his wife each executed wills here in New York. Her will of that date has not been found. But in *his* will, changing from his earlier wills (S. M. p. 1774) in which he had described himself as 'of New York,' he describes himself as 'of Baden-Baden,' and directs that his American estate be converted into cash by his American Executor, the Columbia Trust Company, and the proceeds remitted by it to his German executors—to be distributed by them in Germany *'under the laws and in the tribunals of Germany, my domicile'* (Amended Petition, Ex. B, p. 72, 1st par.). 2726

"Another clause of the will should be noted here, as the Referee has reported that he in this will named Sorenson and Nielsen 'to manage the firm business' (Report, p. 10). On the contrary the will directs that the Trust Company, his executor, 'should leave the management of the firm business *for liquidation,*' in their hands 'to the largest possible degree under the direct supervision of the said Trust Company' (Amended Petition, Ex. B, p. 72).

"He also, on the same page of the will, said:

> " 'It is my desire that the said Trust Company should engage as their attorney and legal counsel 2727 in the administration of the estate, Eugene Smith of the city of New York, who has been conversant with my personal affairs and those of my firm for the past thirty years' (ibid p. 72).

"Sielcken and his wife, immediately after executing these wills, sailed for Germany and he never thereafter returned to the United States.

"The following year, 1915, he received from the estate of George W. Crossman a bequest of $1,000,000. In late 1916 he had this $1,000,000 remitted to him in Germany and with it bought German War bonds (Exs. 10120, paper 15, 10095B, paper A.; S. M. pp. 2977-8).

"Shortly after his return to Germany, and but two weeks after the outbreak of the war between

Germany and France, Sielcken, on August 10, 1914, made formal application to be renaturalized as a German (Exs. 10207 and 10208). This application would seem to have been a complete abandonment of his naturalization as an American citizen, totally irrespective of his subsequent dropping of that application.

"Letter of Porter, Acting Sec'y. of State to Pendleton of Feb. 2, 1886;

"Letter of Sec'y. Olney to Uhl, of Dec. 21, 1896;

2729 "Opinion of Atty. Gen'l. Williams, 1873, 14 Op. 295, and other numerous authorities collated in 3 Moore's Digest of International Law, pp. 711-712 and 739-754.

"At the request of the German authorities he dropped this application 'because he could be of more use to Germany in the war as an American than as a German' (Ex. 10095-B, papers c, d, e, and l).

"The Bezirks-Amt, to which he had made this application, then entered the following curious order on it:

2730 "'There are no objections to the naturalization of the wholesale merchant, August Hermann Sielcken.

"'The naturalization, however, can only be granted—unless we issue an order to the contrary—if Sielcken submits a *further* application. No further communication to Sielcken is to be issued' (Ex. 10209 a and b).

"From then on he was very active in securing foodstuffs, and war material for Germany, and *was still continuing to assist Germany in this way after the United States entered the war* (Ex. 10095-B, papers d and d-1).

"By having these various facts as to Sielcken's active pro-Germanism and application for renaturalization as a German presented to the highest German authorities, by intimate friends of theirs, Sielcken

and his wife, as early as June 1917, secured complete exemption by the German Government from all restrictions on resident enemies in Germany (Ex. 10095 B, papers f 1 and g 1; S. M. p. 3208). The fact that this exemption was procured by such representations was known to the petitioner (Exs. 10095 B papers c-1, e-1; S. M. pp. 2919, 3170) who with that knowledge availed herself repeatedly of this exemption (S. M. pp. 2918, 2932, 2941).

"On March 20, 1917 (the day before the President of the United States called Congress in extra session 2732
to declare war against Germany) Sielcken wrote to his Hamburg bankers, Theodor Wille, (of which firm Gustav Diederichsen, one of the German executors named in his will was the senior member) the following extraordinary letter:

"Translation

"'Mariahalden, Baden-Baden,
"'March 20, 1917

"'Dear Mr. Diederichsen,

"'What you have written me with regard to Vorwerks' wish, communicated to me by Mr. Volcken's, that I should subscribe the war loan at his 2733
place, I would not have considered Vorwerks' transaction in this way.

"'In case I acquire more war loan, I ask you to take for my account, like the last time, one Million dollars or the amount in Marks, respectively. I ask you, therefore, if it is still time, to send the order over. The way it is done by my people, one cannot judge about it. (or one does not know what happened).

"'The last time, when I received a cable direct from New York and tried to answer from here I was not permitted to do so. I had to forward the telegram to Hamburg and after three weeks the Hamburg experts permitted me to dispatch the

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cable to my firm in New York. If it always takes so long one cannot depend on it. If therefore, it is possible, I ask you to wire to my firm with regard to the million dollars.

" 'I have no idea what the rates of exchange are at present, but I imagine the prices are very low.

" 'My wife liked the house of Amsincks. If we have not enough houses my wife can buy the Amsincks' house as an addition. It is to be hoped that she arrives here this evening, all fresh and well again. Unfortunately, she could not get a sleeping car.

2735

" 'I live again in my own house, no longer with Dengler, although I liked it there rather well.

" 'That Holland has to punish the Chinese for Germany is something new to me.

" 'With hearty greetings, I remain,

" 'Yours,

" '(Sgd) *HERMANN SIELCKEN.*'

"(Paper A-1 in Ex. 10095-B).

"We call particular attention to two features of this letter, the phrase *'if it is still time'* and the direction to invest the money in German War Bonds. The first of these shows his anticipation that war would be immediately declared by the United States, as it was but seventeen days later; and the second his intention to assist Germany in the war against the United States.

2736

"Theodor Wille cabled, as directed, in Sielcken's name, to Crossman & Sielcken to remit them $1,000,000 for his account (Ex. 10095-B, paper b). The cablegram was received on March 23, 1917. Obediently Sorenson immediately tried to buy German exchange but was able to buy only $172,500 worth (S. M. pp. 1749-50). But even this sum did not get through, and was returned to the firm six weeks later (Ex. 67).

"Mrs. Sielcken knew at the time of her husband's sending for his $1,000,000 (S. M. p. 2965).

"It is interesting to compare with these facts, an affidavit which the petitioner made in 1927, gotten up by herself and her son in Germany (S. M. p. 2962) and verified by her there (Ex. 10120, paper 2), and presented by her to the Mixed Claims Commission in support of her claims of constant loyalty to the United States, in which she says:

"'When diplomatic relations between the United States and Germany were severed in February 1917, 2738
both my husband, Hermann Sielcken, and I experienced much anxiety regarding our property interests in Germany.' (p. 1 of affidavit of petitioner in Ex. 10120).

Sielcken, however, did not confine his activities against the United States to this effort, but, *after the United States had entered the war,* although he had been unable to get this second $1,000,000 from the United States, he actually bought German War Bonds to the extent of 80,000 Marks in August and September 1917 (Ex. 16 of Ex. 10120).

"This act, if he were an American citizen, (as the 2739
petitioner has been constantly asserting since her arrival in New York in October, 1919), was clearly treasonable.

"Sielcken died shortly after giving this last convincing evidence of his support of Germany against the United States.

"In this connection we may point out, too, that the petitioner herself, later, in March 1918, at the time of the successful German drive toward Amiens against the French and English and a few American troops, herself subscribed for and purchased an additional 100,000 Marks of German War Bonds. (See paper 17 of Ex. 10120, item of March 30, 1918; and letter from Diederichsen to her of March 22, 1918, Ex. 10094 for Ident., extract received in evidence at S. M. pp. 2922-2923.)

"Later in 1918, after her husband's death, when the German Treuhänder sought to seize her own property and that of her husband's estate, on the ground that she was an American and an enemy of Germany, she had Diederichsen write to the German Treuhänder urging him not to do so because, as Diedrichsen wrote to the Treuhänder, with her approval and knowledge (S. M. pp. 2922-3):

"'Mr. Hermann Sielcken, owner of the firm of Crossman & Sielcken, in New York, for a number
2741 of years back, resided in summer in Baden-Baden and, *since his marriage in autumn 1913, resided permanently in Baden-Baden.* He was born in Hamburg, and, *after the outbreak of the war, he had already filed an application for the re-acquisition of his German citizenship, but did not press said application because, in view of the business transactions which he, as an American, had made with the German Empire in the interest of supplying Germany with food, it seemed to our authorities more desirable for him to retain his American citizenship for the time being.* The late Mr. Sielcken gave his own person and property, to the
2742 fullest extent, to German interests. As examples for his purely German feelings we may only mention, among other things, his substantial regular contributions to the War Emergency Committee ('War Help') and the Red Cross, the keeping-up of a hospital and a Maternity Home in Baden-Baden, as well as his donation of 1 Million Marks for the dependants of war veterans in Baden.

"'*Mrs Sielcken comes from an old German family and it was only through her marriage to Mr. Sielcken, in the autumn of 1913, that she lost her German citizenship. As a widow she can, therefore, at any time re-acquire her German citizenship* under the law of July 22, 1913, relating to citizenship, without having to go through the formalities otherwise prescribed, *and she intends to do so. Up*

to the present, she refrained from doing so in view of the very substantial property arising out of the estate of her late husband situate in the United States which came to her as sole heir and the realization and representation of which might in future be simplified by the fact that Mrs. Sielcken has as yet not given up her American citizenship.

"'Under these circumstances, we would ask, also in the name of Mrs. Sielcken, to refrain from any further measures with regard to her property.' (Italics ours.) (Ex. 10095-B, papers l and l-1.) 2744

"In response the Treuhänder wrote her withdrawing his claim to the property, adding

"'Only in case you should make an essential change in your property, kindly advise me thereof.' (Ex. 10095-B, papers m and m-1.)

"We shall see later what contrary representations she later made to the authorities here, when seeking to get her property back from the American Custodian and in other proceedings here.

"This renaturalization application of Sielcken's and his and the petitioner's pro-German activities during the war were unknown over here." 2745

Under the Trading with the Enemy Act a debt claimant must be "not an enemy or ally of an enemy." Assuming, *arguendo,* that Hermann Sielcken, though resident in Germany during the war, was nevertheless a loyal American citizen because of his detention there against his will, that fact would be immaterial in the case of a debt claim, and the *Stadtmuller* decision, to which reference is made in the affidavit of Mr. Avery on page 11 thereof, has no application. In any event, the status of Hermann Sielcken, upon the statement of Messrs. Bacon and Smith before the Surrogate, is shown beyond any doubt to be that of a person loyal to Germany alone. In this connection also, attention is called to a letter

to G. W. Kirkpatrick, one of the four Export Managers of Crossman & Sielcken, dated March 1, 1915, and written in Sielcken's own handwriting, a copy of which is hereto annexed and marked Exhibit 3, in which the following appears:

> "It is a pity we cannot ship Rubber or Copper as a good German I would run the risk on Rubber. I cannot ask the same of you. I would be willing to give any kind of an oath the same as I am willing to die for Germany."

2747 Included in the cargoes which were the subject matter of the instant suit, as shown on the books of Crossman & Sielcken, Brazil Ledgers, J710-K916, was the following item:

> "April 23, 1915, W. 19617 Ft. black walnut $5399.-48."

In the letter above referred to, Exhibit 3, the following paragraph is noted:

> "The inquiry about Walnut is for the largest factory of arms in Germany and will be still necessary after the war is over. The amount required is
2748 very large and they are willing to pay any price for prompt shipment."

There is, consequently, no merit whatsoever in any contention that Sielcken was a loyal American citizen or that "despite his being in Germany from April 6, 1917 until his death, Mr. Sielcken had not been an enemy." (Affidavit of Mr. Avery, page 11.)

With reference to Mr. Warren's statement on page 7 of his affidavit to the effect that early in 1918 the correspondence between the Trust Company and the Alien Property Custodian clearly showed that the property of Crossman & Sielcken and of Hermann Sielcken was *held* by the Trust Company as executor of Hermann Sielcken and *not* by the Alien Property Custodian, this deponent desires to point out that this statement does not represent the full story. The files of the Trust Company and those

of the Department of Justice clearly show *that such property was held by the executor, but that it was so held for the account of the Alien Property Custodian.* Attached hereto are copies of a number of letters clearly establishing that fact, most of which are signed by Mr. Warren himself. These letters should have been included in the group of nine letters attached to Mr. Warren's affidavit (marked Exhibit K thereof) in order to have presented the actual facts. This deponent therefore attaches such correspondence hereto, as a part hereof, marked Exhibit 4, 4-a to 4-w, inclusive.

2750

With further reference to the position of the Trust Company, acting as agent and depositary for the Alien Property Custodian, as well as executor for the estate of Hermann Sielcken, there are attached hereto and made a part hereof, photostats of copies of a Designation of Depositary, dated December 31, 1917, marked Exhibit 5; Designation of Depositary dated July 30, 1918, marked Exhibit 5-a; and a Bond of Depositary dated December 28, 1917, marked Exhibit 5-b. The first two of these were accepted by the Columbia Trust Company, and the latter was executed by it. There are also attached hereto and made a part hereof as Exhibits 5-c, 5-d and 5-e, three specific designations of depositary with reference to Hermann Sielcken, Hermann Sielcken, deceased, and the estate of Hermann Sielcken.

2751

Insofar as the statements of Mr. Warren are concerned which either directly deny or by inference question the seizure of the assets of the firm of Crossman & Sielcken or of the assets of Hermann Sielcken by the Alien Property Custodian or the purported return to the executor by the Custodian of such assets in the early part of January, 1918, there is attached hereto, made a part hereof and marked Exhibit 6, a photostatic copy of the original "Individual Trust Ledger, Alien Property Custodian, Washington, Trust No. 1, Account of enemy, Hermann Sielcken, Address, Baden-Baden, Germany." This ledger account shows clearly that the books of the Alien Property Custodian carried the Sielcken account

2752 *Reply Affidavit of Frank C. Sterck*

as late as April 16, 1921, and until the final payments were made under the various claims filed against Trust No. 1.

In view of the fact that the lower right-hand corner of the original Individual Trust Ledger sheet (Exhibit 6) has been worn off by time and usage, there is attached hereto, made a part hereof and marked Exhibit 6-a, a photostat of a typewritten copy of the original ledger sheet which includes the figures completing Exhibit 6. There are also attached hereto and made a
2753 part hereof, marked Exhibit 6-b and 6-c, photostatic copies of the "credit tickets" upon which the entries of October 26, 1917 in the amount of $100,000 and of $5,171,889.95 were based.

From the above mentioned Exhibits it is clear that Hermann Sielcken was at all times described on the books of the Alien Property Custodian as an enemy; that after his death became known his account was carried as an enemy account; that not only the $100,000 item, voluntarily sent in to the Custodian by Sorenson and Nielsen, was entered upon the seizure books, but that the interest of Hermann Sielcken in the copartnership of Crossman & Sielcken as per the report of Arthur
2754 Young & Co., in the amount of $5,171,889.95, was likewise placed on the seizure ledgers; and that it so remained there until the allowance of the respective claims filed against Trust No. 1 in the name of Hermann Sielcken in April of 1921 in purported pursuance of the Trading with the Enemy Act as amended.

FRANK C. STERCK.

Sworn to before me this 15th
day of September, 1938.
Isidore M. Fuchs,
Notary Public, Bronx County.
Bronx Co. Clk's No. 153, Reg. No. 152F40.
N. Y. Co. Clk's No. 812, Reg. No. OF448.
Commission expires March 30, 1940.
(Seal)

Index to Exhibits, (Annexed to Reply Affidavit of Frank C. Sterck). 2755

Exhibits

1 Pertinent part of Affidavit of Mr. Brainard Avery, executed on April 22, 1932.

2 Copy of dollar account "due Crossman & Sielcken from Theodor Wille," identified as "Reference Brazil Ledger J402-K 390."

3 Letter of Mr. Sielcken to G. W. Kirkpatrick, dated March 1, 1915.

4 Letter to George E. Warren from Edward Cornell, dated December 8, 1917. 2756

4-a Letter to Joseph A. Bower from George E. Warren, dated December 17, 1917.

4-b Letter to C. E. Hunter from J. A. Bower, dated December 18, 1917.

4-c Letter to Mr. Joseph A. Bower, from C. E. Hunter, dated December 19, 1917.

4-d Letter to George E. Warren from James M. Gifford, dated December 19, 1917.

4-e Letter to New York Office from C. E. Hunter, dated January 9, 1918. 2757

4-f Letter to H. M. Kilbourn from G. E. Warren, dated February 4, 1918.

4-g Letter to New York Office from C. E. Hunter, dated February 5, 1918.

4-h Letter to G. E. Warren from Manager, New York Office, General Business Dept., dated February 5, 1918.

4-i Letter to F. J. Horne from G. E. Warren, dated February 19, 1918.

4-j Letter to the Columbia Trust Co. from Ass't Director, Bureau of Trusts, APC, dated February 20, 1918.

2758 *Index to Exhibits, Annexed to Reply Affidavit of Frank C. Sterck*

Exhibit

4-k Letter to Atlantic Mutual Insurance Co. from Ass't Director, Bureau of Trusts, APC, dated Feb. 20, 1918.

4-l Letter to F. J. Horne from G. E. Warren, dated February 23, 1918.

4-m Letter to Alien Property Custodian from President of the Atlantic Mutual Insurance Company,
2759 dated February 23, 1918.

4-n Letter to F. J. Horne from G. E. Warren, dated May 7, 1918.

4-o Letter to F. J. Horne from G. E. Warren, dated May 23, 1918.

4-p Letter to Messrs. Crossman and Sielcken from Director, Bureau of Trusts, APC, dated June 6, 1918, and enclosure.

4-q Letter to Hon. A. Mitchell Palmer from G. E. Warren, dated Oct. 1, 1918.

4-r Letter Alien Property Custodian from G. E. Warren, dated Nov. 1, 1918.
2760

4-s Letter to Henry E. Ahern from G. E. Warren, dated May 13, 1919.

4-t Letter to George E. Warren from Director-Bureau of Trusts, APC, dated May 19, 1919.

4-u Letter to Henry E. Ahern from G. E. Warren, dated May 20, 1919.

4-v Letter to Morgan M. Mann from Bureau of Law, APC, dated Oct. 18, 1919.

4-w Letter to Walter U. Varney from G. E. Warren, dated October 22, 1919.

Index to Exhibits Annexed to Reply Affidavit of Frank C. Sterck 2761

Exhibit

5 Designation of Depositary, dated December 31, 1917.

5-a Designation of Depositary, dated July 30, 1918.

5-b Bond of Depositary, dated December 28, 1917.

5-c Designation of Depositary, dated April 2, 1918.

5-d Designation of Depositary, dated April 6, 1918.

5-e Designation of Depositary, dated October 19, 1918. 2762

6 "Individual Trust Ledger, Alien Property Custodian, Washington, Trust No. 1, Account of enemy, Hermann Sielcken, Address, Baden Baden, Germany."

6-a Typewritter copy of Exhibit 6.

6-b Credit Ticket No. 1.

6-c Credit Ticket No. 15.

2763

2764 **Exhibit 1, Annexed to Reply Affidavit of Frank C. Sterck.**

Pertinent Part of Affidavit of Mr. Brainard Avery.

SURROGATES' COURT,

COUNTY OF NEW YORK.

IN THE MATTER

of

2765 The Estate of Hermann Sieckien, Deceased.

State of New York,
County of New York, ss:

Brainard Avery, being duly sworn, deposes and says:

I am an attorney and member of the firm of Avery & Whiting, of No. 100 Broadway, New York City. Since 1927 I have been, and now am, personal counsel for Mrs. Clara Sielcken-Schwarz.

I first met Alex W. Sielcken, son of Mrs. Clara Sielcken-Schwarz, during the year 1926. In the spring of
2766 1927, during the course of other professional engagements, Mr. Sielcken spoke to me regarding certain claims that had been filed in 1922 on behalf of the Columbia Trust Company (now Irving Trust Company) as executor of the estate of Hermann Sielcken, deceased, with the Mixed Claims Commission (United States and Germany), at Washington, D. C., and had been subsequently withdrawn. Mr. Sielcken, on behalf of his mother, residuary legatee under the will of Hermann Sielcken, deceased, requested me to investigate these claims, with a view to reinstating and prosecuting them, if the facts warranted. The claims related to the seizure and condemnation in the British Prize Court of six certain cargoes shipped from New York by the firm of Crossman & Sielcken, destined to neutral consignees in Baltic ports, in the year 1915, and to certain indebtedness of the firm of Theodor Wille, of Hamburg, Germany to Crossman & Sielcken.

I immediately began an exhaustive investigation with respect to said claims and spent two months in Ger-

many during the summer of 1927. As the facts gradually became disclosed, I became convinced that meritorious claims existed against the German Government and the firm of Theodor Wille. Upon my return from abroad in October, 1927, I succeeded in having these claims reinstated before the Mixed Claims Commission and in December, 1927, caused an action to be instituted in the U. S. District Court for the Southern District of New York on behalf of Crossman & Sielcken (in Liq.) against the Alien Property Custodian and Zentral-Einkaufs-gesellschaft, m. b. H. (a war time purchasing agency of the German Government, hereinafter called Z. E. G.) which said agency I had discovered was the actual purchaser of the aforesaid cargoes, sometimes referred to as the Copenhagen cargoes, the effect of which action was to attach funds belonging to said Z. E. G. in the custody of the Alien Property Custodian. 2768

It seems unnecessary for present purposes to narrate in detail the extended legal services rendered in connection with the prosecution of these claims. The work covered a period of approximately three years, during which time I was continuously engaged on these matters and with relation thereto made three trips to Germany. Counsel associated with me also made trips to Germany and devoted many months there to investigation. I had numerous conferences in these matters in New York with John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the firm of Crossman & Sielcken. William Martin, an accountant, at my request, went over the books and records of Crossman & Sielcken in Liq., insofar as they related to the claims in question, Voluminous records were located in Hamburg and Baden-Baden, Germany, which were transmitted to New York. The facts were complicated, not easy to understand, and became unraveled by degrees. 2769

The prosecution of these claims ultimately resulted in:

(1) A decree entered on December 30, 1929, in the United States District Court for the Southern District

2770 *Exhibit 1 Annexed to Reply Affidavit of Frank C. Sterck*

of New York in favor of the liquidation of Crossman & Sielcken against the Alien Property Custodian and Z. E. G. for $727,618.93, including accrued interest, which was paid, principal and interest, in April, 1930. The private banking house of Theodor Wille, of Hamburg, Germany, had in fact a joint one-half beneficial interest with Crossman & Sielcken in the claim arising upon the said Copenhagen cargoes, and, too, at the time of said recovery and because thereof, Z. E. G. was in effect asserting a substantial claim against Crossman & Sielcken by way of the estate of Hermann Sielcken, in Germany,
2771 by reason of a settlement that had been made during the period of the World War, with reference to said cargoes, between Z. E. G. and the executors in Germany of the Sielcken estate, undertaking to act in said matter.

In order to work out a settlement of these conflicting interrelated claims existing between Z. E. G., the house of Wille and the estate of Hermann Sielcken, all finding their origin in the matter of the Copenhagen cargoes, a settlement was made between the said parties, whereby one-half of the aforesaid sum of $727,618.93 was paid to Z. E. G. in consideration of the release of its
2772 said claim and the sum of $50,000 was paid to the house of Theodor Wille in release of its said claim, so that out of said total sum recovered there was left to the estate of Hermann Sielcken the net sum of $313,340.70, subject to legal fees and expenses.

(2) An award granted by the Mixed Claims Commission on April 21, 1930, in favor of the Irving Trust Company, as executor, and of Crossman & Sielcken in Liq. against the German Government, based upon the so-called Wille claims, amounting to $558,827.85, with interest thereon at the rate of 5% per annum from April 1, 1918, to date of payment, principal and interest at the time of the award amounting approximately to the sum of $900,000. Various payments have been made by Germany through the U. S. Treasury Department on account of said award and there now remains a bal-

ance unpaid thereon in excess of $300,000. The payment of this balance depends upon the receipt of funds from Germany available for such purpose.

Shortly after the aforesaid recoveries were made Mr. Sorenson began definitely to assert that he, individually, as a surviving partner of the firm of Crossman & Sielcken, had a substantial interest in the said recoveries and finally, both directly and through his personal accountant and counsel, his claim finally took definite form on the basis of the contention that the aforesaid recoveries were to be deemed substantially *in toto* as profits of the firm of Crossman & Sielcken realized in the year 1930 and that he accordingly was entitled to 12½% of same. Mr. Nielsen did not, so far as I know or am informed, make any such claim in his own behalf during his lifetime, but as will be pointed out below, the executor of his estate, after Mr. Nielsen's death, asserted a like claim to that of the Sorenson claim in behalf of Mr. Nielsen's estate against Crossman & Sielcken in Liq. and the estate of Hermann Sielcken, deceased, which latter claim is now the subject of present litigation pending and undetermined in the Supreme Court, New York County, as shown below. In addition to the said claims so asserted by Sorenson and by the Nielsen estate, four managers, formerly employed in the export department of the firm of Crossman & Sielcken, have asserted each in his own behalf claims upon the said recovery made for the so-called Copenhagen cargoes, which several claims of the said export managers are also the subject of—

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2775

* * * * * *

When the Nielson estate and Sorenson, in the said accounting action now being tried before Henry F. Wolff, Esq., as Referee, recently attempted to set up as an effectual bar to their own wrongful acts the said decree, settling and allowing the account of said executor, in this Surrogates' Court, which was based upon information furnished exclusively by Nielsen and Sorenson for their own unjust enrichment, I counselled Clara Sielcken

2776 *Exhibit 1 Annexed to Reply Affidavit of Frank C. Sterck*

Schwarz that, in my judgment, her only recourse in the interests of justice and fair dealing was to make an application to this Surrogates' Court to reopen and set aside the accounting decree.

The only persons interested in this instance application and proceeding and their respective post office addresses are as follows:

John S. Sorenson, whose post office address is 757 Carroll Street, in the Borough of Brooklyn, New York City;

The Chase National Bank of the City of New York,
2777 as ancillary executor in New York of the last will and testament of Thorleif S. B. Nielsen, deceased, whose post office address is 18 Pine Street, in the Borough of Manhattan, New York City; and

Irving Trust Company, as executor of the last will and testament of Hermann Sielcken, deceased, whose post office address is 1 Wall Street, in the Borough of Manhattan, New York City.

BRAINARD AVERY.

Sworn to before me this
22d day of April, 1932.
Emilie B. Bender.
2778
(Notarial Stamp.)

Exhibit 2, Annexed to Reply Affidavit of Frank C. Sterck.

Copy of Dollar Account "Due Crossman & Sielcken From Theodor Wille" Identified as "Reference Brazil Ledger J402-K390."

DUE CROSSMAN & SIELCKEN FROM THEODOR WILLE
DOLLAR ACCOUNT

Reference Brazil Ledger J 402-K 390 — Schedule 5

		Dollars			
1917	Amount brought forward	623,632.00	1917	Amount brought forward	
Apr. 27,	To Draft	3,242.09	Oct. 8,	By Balance	
" 27,	"	1,000.00			
May 7,	"	500.00			
" 10,	"	1,000.00			
" 16,	"	100.00			
June 14,	Services re loss on Coffee ex. "Carrillo"	28.50			
" 30,	Interest at 5%	10,220.29			
Aug. 10,	Charges on damaged coffee ex. "Sixaolo"	9.20			
Sept. 12	Cablegram to H. Hoeffner	7.15			
" 30,	Interest at 5%	4,805.00			
" 30,	Half loss on Copenhagen Cargoes—Schedule 5C	177,104.48			
		821,648.71			
1917			1917		
Oct. 1,	To Balance	551,251.42	Oct. 9,	By Proceeds, 427 B/C "Savamacca"	
" 8,	Interest at 5%—8 days to October 8, 1927	1,630.08	1918		
			Feb. 18,	Woolson Spice Co.—Dividend	
			Aug. 23,	Proceeds of sale by Alien Property Custodian of 360 shares Woolson Spice Co. stock at $680.00 equals	244,800.00
				Less—Expenses	174.03
			Aug. 23,	Balance	
		552,881.50			
1918					
Aug. 23,	To Balance	2[illegible],781.37			
" 23,	Interest at 5% on appropriate credits to the date of the respective credit	11,168.63			
1918					
Aug. 23,	To Balance due Crossman & Sielcken from Theodor Wille	$296,950.00			

2782 *Exhibit 2 Annexed to Reply Affidavit of Frank C. Sterck*

Schedule 5C

DUE CROSSMAN & SIELCKEN FROM THEODOR WILLE
HALF LOSS ON COPENHAGEN CARGOES

REFERENCE IMPORT JOURNAL 4/259

			Debits	Credits
To amount of Theodor Wille's 1/2 share on Copenhagen Cargoes shipped in 1915 (seized by British Govt. as follows):				
Feb. 27,	per S/S	Hilding	95,578.29	
Mar. 23,		Arkansas	48,686.81	
" 30,		Hellig Olav	28,105.99	
Apr. 13,		Gunborg	43,997.16	
" 28,		Indianic	53,471.41	
" 28,		Oscar II	33,625.87	
			353,465.53	
2783 May 26,	Received for Cereals S/S Oscar II		8,050.44	
			$345,415.09	
Add—Copenhagen Expenses paid by Theodor Wille			20,206.39	
Legal Fees London & N. Y.			14,533.47	
Interest to 9/30/17 at 5%			40,695.61	
			$420,850.56	
Less—Profits on Cargoes			66,641.60	
			$354,208.96	
1/2 of $354,208.96 equals			$177,104.48	
Charged to Theodor Wille-Dollar Account (amount due Crossman & Sielcken)				$177,104.48
			$177,104.48	$177,104.48

2784

Exhibit 3, Annexed to Reply Affidavit of Frank C. Sterck. 2785

Letter of Mr. Sielcken to G. W. Kirkpatrick, Dated March 1, 1915.

(Envelope):

G. W. Kirkpatrick Esqr.
c/o Crossman & Sielcken
90-96 Wall street
New York 2786

(Letter):

Hotel Aicton Pertin W
Unter den Linden 1
(Illegible.)

March 1/1915

My dear Mr. Kirkpatrick 2787

I am much pleased with your letter of Jany 26 and fully understand your complaints about the freights and the treatment of Finch Edge I: The latter received their instructions from the owners in Copenhagen, & are no doubt afraid that our shipments are for Germany I have spoken here to Mr. Volkens the senior partner of Finch Edge I: and he will do everything possible. Your engagement of 1000 tons of freight until June (inclusive) is all right. I have placed it & will probably order you to engage more. But I will get the order in writing, as freights are so high, that a lot of money can be lost.

Regarding Italy and Paulsen you will know, how to be careful, it is extremely dangerous, at the same time, this is an opportunity to make money.

Grain charters I had a great fight with a company, which was willing to do the business, we are doing, & promised all sorts of advantages which they cannot realize. They promised more then they can keep. Now I think the grain charters are sure if we can execute

2788 *Exhibit 3, Annexed to Reply Affidavit of Frank C. Sterck*

them in New York. They wanted cargoes of wheat, corn & Rye, As the latter is very difficult, you will have to get wheat & Corn. Oats are very much wanted, that however is contraband of war. The amount wanted here is some 35000 tons. Regarding Finances 3/4 is paid in New York, upon completing the cargo & the other 1/4 is paid on arrival here. I hope you will be fortunate in buying in New York, as the market fluctuates so violently. This business is very important & brings us into the highest quarters in Germany, & you will do no doubt everything in your power.

2789 The inquiry about Walnut is for the largest factory of arms in Germany, & will be still necessary after the war is over. The amount required is very large, and they are willing to pay any price for prompt shipment.

It is a pity we cannot ship Rubber or Copper. As a good German I would run the risk on Rubber. I cannot ask the same of you. I would be willing to give any kind of an oath, the same as I am willing to die for Germany.

Keep a sharp eye on Guinle they are in a lot of trouble, and the whole family does not understand much about business. Arnold is the best in the lot. Out of

2790 such an account in these times we ought to make big commission from 5 to 10%.

I have no doubt we will win the war, when? Nobody can guess easily. I remain here until the charter business is successfully undertaken.

Very truly yours

HERMANN SIELCKEN

Exhibit 4, Annexed to Reply Affidavit of Frank C. Sterck. 2791

DAVIES, AUERBACH & CORNELL

34 Nassau Street,

New York, December 8, 1917

Dear Sir:

I write in response to your request for advice concerning the disposition to be made of approximately 800 tons of rubber, which your Company, acting for Mr. J. A. Bower, representing the Alien Property Custodian, has taken into its possession from the firm of Crossman & Sielcken, who held the rubber as security for certain advances. 2792

I have examined the copies of the correspondence of Crossman & Sielcken which you sent me, consisting of letters from Mr. Sielcken, the senior partner, who was in Germany, to the partners in New York; a letter, dated February 26, 1916, from Weber & Schaer, of Hamburg, for whose account this business was undertaken; a letter, dated February 28, 1916, from the Deutsche Bank, Berlin, in which the Bank guarantees to reimburse the firm for certain advances desired to be made for the account of Weber & Schaer in the matter; also certain subsequent correspondence with Weber & Schaer, with Mr. Hilken, and with Mr. Lodders, who acted as the representatives in this country and South America, of Weber & Schaer. 2793

Although certain of the later correspondence would appear to indicate that this business was handled by Mr. Hilken, as principal, I think it is clear from the correspondence that this was not the fact and that the principals in the transaction, so far as Crossman are concerned, are Weber & Schaer, of Hamburg.

The letter from the Deutsche Bank may impose some liability on that Bank to reimburse Crossman & Sielcken, though this would depend on the question of fact as to whether the advances made by Crossman & Sielcken conformed to the terms of the letter from the Deutsche Bank, which were limited to purchases from certain parties in South America and were also limited in time.

2794 *Exhibit 4 Annexed to Reply Affidavit of Frank C. Sterck*

I understand from a conversation with Mr. Sorenson, one of the partners of Crossman & Sielcken, that it is his belief that as a matter of fact the credits were not given in accordance with the letter of the Deutsche Bank. I suggest that it would be well to have the books of the firm carefully examined on this matter.

Whether this is correct or not, the parties now interested in the equity in the rubber are resident in Germany and the Alien Property Custodian, as Trustee for them, can now, as representing such equity, direct
2795 or assent to the sale of such rubber.

It remains to consider whose consent is necessary on behalf of the lienholder. The firm of Crossman & Sielcken was composed of Mr. Siecken, who resided in Germany, and whose citizenship is in doubt, and Mr. Sorenson and Mr. Nielsen, American citizens, residing here. Under the partnership articles, the entire capital and assets of the firm belong to Mr. Sielcken, the interest of the other partners being confined to a portion of the profits, to be determined by a balance sheet and inventory.

In view of the fact that I have been previously consulted by Messrs. Sorenson & Nielsen with regard to their interests in the firm assets, I understand that you will
2796 take other advice on the question as to whether they now have any interest in the assets of the firm. This letter is written upon the assumption that they do not have any such interest, and therefore that the Alien Property Custodian, as Trustee for Mr. Sielcken, has the power to assent to the sale of the rubber, though, in view of the fact that certain of the correspondence would lend color to a claim on the part of Mr. Hilken that he is a principal in the matter, it might be prudent before doing so, to put him upon record, if possible, as being merely an agent for Weber & Schaer. I think, however, that the correspondence would be sufficient to prove such agency, even though he should now claim to be the principal.

I therefore advise, that after having received independent advice that Messrs. Sorenson and Nielsen can have no claim of title in the rubber under the terms

Exhibit 4 Annexed to Reply Affidavit of Frank C. Sterck 2797

of the partnership agreement, you should obtain the instructions of the Alien Property Custodian, as Trustee, representing the interests of Mr. Sielcken, of Weber & Schaer, and of the Deutsche Bank, if any, with regard to the sale or other disposition of the rubber.

Very truly yours,

EDWARD CORNELL

George E. Warren, Esq.
Vice-President, Columbia Trust Company,
60 Broadway, 2798
New York, N. Y.

MHR/EP.

2799

2800 **Exhibit 4-a, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

December 17, 1917

Joseph A. Bower, Esq., Manager
Business Department,
Enemy Alien Custodian
120 Broadway, New York City.

Received 12/17/1917
Answered 12/18/1917
By J. A. B.

2801

My dear Mr. Bower:

We have received a copy of the "Frankfurter Zeitung," a daily newspaper published in Frankfurt, Germany, dated October 11, 1917, containing a formal notice of the death of HERMANN SIELCKEN, who died on October 8th, 1917.

The Columbia Trust Company is in possession of a will signed by Mr. Siecken in which it is named as executor, and which we are now advised by counsel should be filed for probate. In view of the fact that this apparently alters the situation as regards the assets
2802 of the firm of Crossman & Sielcken, it will become necessary for the executor to account for the estate as of the date of Mr. Sielcken's death, October 8th, 1917, and to open up a set of books as of that date.

Do you not think it would be possible for the Alien Enemy Custodian to permit the turning over of the assets of Crossman & Sielcken to us as executor when the will is admitted to probate. We can then proceed to account for the value of the estate as of October 8th, the date of Mr. Sielcken's death, bring proceedings for the determination of the New York State Inheritance Tax, the Federal Inheritance Tax, liquidating any claims due to American citizens, and be prepared to hold for account of or turn over to the Alien Enemy Custodian, such proportion of the estate as belongs to alien enemies.

Awaiting your further advices or instructions, I am

Yours respectfully,

G. E. WARREN
Vice-President

gew.dw

Exhibit 4-b, Annexed to Reply Affidavit of Frank C. Sterck. 2803

ALIEN PROPERTY CUSTODIAN

Washington

16th & P Streets N W.

December 18, 1917.

C. E. Hunter, Esq.,
c/o Alien Property Custodian,
Washington, D. C.

2804

Dear Mr. Hunter:

Enclosed is copy of a letter today received from the Columbia Trust Company, with reference to the offering of Hermann Sielcken's will for probate and copy of my reply.

Mr. Warren spoke to me about this the other day, and I asked him to write me and I would forward the letter to you for advices in the premises.

I would think when the will is admitted we could permit the Trust Company to be sole custodian as executor of the will, and allow the matter to be discharged from your Department and go into the Estates Department.

2805

As it will be some time before the will is admitted, we will proceed as we have in the past to liquidate.

Please give us a ruling on the matter.

Very respectfully,

J. A. BOWER
Manager, General Business Dept.

BJ
Enc.
Rec'd. 12-19-1917
Ansd.
File Trust #1
Crossman & Sielcken

2806 **Exhibit 4-c, Annexed to Reply Affidavit of Frank C. Sterck.**

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW.

Washington, D. C.

General Business Department.

2807

December 19, 1917. GB 192.

Trust No. 1.

Mr. Joseph A. Bower, Manager,
General Business Department,
Alien Property Custodian,
New York City, N. Y.

Dear Sir:

Answering your letter of December 18th, relative to the Trust Company being appointed the sole custodian, I
2808 referred the entire matter to the Noon meeting, Mr. Palmer being absent. An extract from the minutes reads as follows:

"In re the application made by the Columbia Trust Company named as executor under the will of Herman Seilcken for permission to that Company to conduct, manage and liquidate the business solely—it was decided that the better policy seems to be that our business manager, Mr. Bower, should continue substantially as heretofore suggesting, however, to the Columbia Trust Company, that he would welcome its co-operation and assistance in the conduct and liquidation of such business."

Please be governed accordingly.

Yours very truly,

C. E. HUNTER
Assistant Manager.

Exhibit 4-d, Annexed to Reply Affidavit of Frank C. Sterck. 2809

Law Offices

GIFFORD HOBBS & BEARD

60 Broadway

New York, December 19, 1917

George E. Warren, Esq.
V. P. Columbia Trust Co.
60 Broadway, New York City.

Dear Mr. Warren: 2810

I have further considered the question which you have submitted with reference to the right of John J. Sorenson and Thorleif B. Neilson, as surviving partners of Crossman & Sielcken to withdrew the profits to which they are entitled, as shown by balance sheet and statement prepared as of the 30th day of September, 1917.

Certain facts have been submitted as follows:

A balance sheet or statement has been prepared as of the 30th day of September (October 1st), 1917, from which it appears that the firm has made a profit subject to division in the proportion stated in the Copartnership 2811 Agreement, pursuant to which the firm of Crossman & Sielcken was formed.

Paragraph Tenth of the agreement provides that on or about the first day of October a full inventory account and balance sheet should be made and signed by the partners, which should state the debts and liabilities of the partnership and the net value thereof, as well as the profits standing to the credit of each member of the firm.

A statement has been prepared as of the 30th day of September, say, October 1st, 1917, conforming, as I understand it, in all respects to the requirements of the Tenth paragraph except that it is not the act of the partners and has not been signed by all the partners.

This statement, therefore, under Paragraph Tenth, would not, in my judgment, bind Herman Sielcken, if living.

2812 *Exhibit 4d Annexed to Reply Affidavit of Frank C. Sterck*

The question, therefore, is: Does it constitute a proper basis of settlement and adjustment with the surviving partners, it being admitted that since said date the said Sielcken has died?

I understand that Mr. Sielcken died on the 8th day of October. If the Copartnership Agreement was not terminated prior to that time, it would be terminated on that date. If it was terminated under the Enemy Alien Act prior to that time, that would doubtless be the date of adjustment. In any event, therefore, the adjustment
2813 should be made as of date not later than October 8th, the day of the death of Mr. Sielcken.

I am advised that in case the inventory, account and balance sheet had been prepared as of the 8th day of October, it would have been substantially the same as that actually prepared under date of September 30th, and that, therefore, for all practical purposes, the 8th of October may be taken as the date of adjustment.

The date of adjustment, therefore, in my judgment, must be fixed either as the date when the partnership was dissolved by *force majeure*, namely, by act of the Government, or at date of death, and at no later date.

It is, therefore, my opinion that, acting in behalf of the
2814 Alien Property Custodian, and, so far as you have any authority to act, in behalf of the Estate, you may safely take the inventory, account and balance sheet as of the 30th of September, assuming that there will be no practical difference between that date and the day of death.

Paragraph Eleventh of the Copartnership Agreement provides as follows:

"ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm."

I assume that "his capital as above defined" ascertained and determined as of September 30th would be substantially the same, in any event as great, as of the

Exhibit 4f Annexed to Reply Affidavit of Frank C. Sterck 2815

8th of October, the date of his death.

It is my judgment that the method adopted is correct and that the date of death or dissolution by act of the Government as above stated, fixes the time and that the interests, both of the survivors and of the representative of the deceased, should be ascertained, therefore, at one of said dates and that there being no material difference in the status between the two dates, the statement of September 30th (or October 1st) may be regarded as an accurate statement as of the 8th of October, 1917.

If I am correct in this assumption, then it is my opinion that the surviving partners are entitled to be paid their shares of the profits as shown by the statement in question, all the capital assets and profits representing the share of said Sielcken, to be paid over in due course to the party legally representing said estate. 2816

Very truly yours,

JAMES M. GIFFORD

2817

2818 **Exhibit 4-e, Annexed to Reply Affidavit of Frank C. Sterck.**

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN
Sixteenth and P Streets NW.
Washington, D. C.

General Business
Department.

2819

January 9, 1918. GB 402.

New York Office: Crossman & Sielcken.

At the meeting held in Mr. Palmer's office January 8th, attended by Messrs. Palmer, Horne, Foster, Dunn, Fleming, Mann, Watson, Bower, Kilbourn and Hunter, the suggestion of the Columbia Trust Company, to the effect that we agree to their acting as sole executor and turning over to us the amount to which the Sielcken interests will be entitled after completion of the liquidation, was approved.

2820

Very truly yours,

C. E. HUNTER,
Per J. M. B.
General Business Dept.

CEH/JMB.

Exhibit 4-f, Annexed to Reply Affidavit of Frank C. Sterck. 2821

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

February 4, 1918

H. M. Kilbourn, Esq.
Manager New York Office,
Alien Property Custodian
111 Broadway, New York City. 2822

Dear Mr. Kilbourn:

Referring to your inquiry in regard to the stock of the Woolson Spice Company held in the SIELCKEN estate, I write to advise that this property is held by the Columbia Trust Company as Executor under the will of Hermann Sielcken, which will has been filed for probate in New York. We are advised that the status of the property held by the Executor has changed its character, so that it is no longer alien enemy property, title vesting in the executor, which is a New York corporation.

The executor will administer the estate and will account in due course of administration, accounting of course to the Alien Property Custodian for any property which would be payable to alien enemies. (This is in accordance with the terms of the license issued by the War Trade Board.) 2823

Under the Sielcken Will, we are directed to dispose of this property, and it is entirely possible that the stock of the Woolson Spice Company will be sold before we account, so that the stock will never become the property of an alien enemy. In view of this situation, I do not see that the executor would have any authority to transfer the stock to the name of the Alien Property Custodian. I might state that I have taken up this question *with* Mr. Morgan M. Mann, who is counsel for the Alien Property Custodian, and he concurs with these views.

As you are aware, before the stock was taken over

2824 *Exhibit 4f Annexed to Reply Affidavit of Frank C. Sterck*

by the Executor, shares were issued by Crossman & Sielcken in liquidation in the names of the several Directors appointed to represent the Alien Property Custodian, in order to qualify them as Directors.

Trusting this will give you the information you desire, I am

Yours very truly,

G. E. WARREN
Vice-President

2825 g. e. w./DW.

A. P. C. Bureau of Law received, Feb. 11, 1918.
Referred to
Answered
Date
No.

Mann 350

2826

Exhibit 4-g, Annexed to Reply Affidavit of Frank C. Sterck. 2827

In replying address only
The Alien Property Custodian
and refer to No.

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW.

Washington, D. C.

General Business
Department

2828

February 5, 1918. GB-755

Re: Crossman & Sielcken
Trust No. 1 & 7701

To New York Office.

I wish you would advise, for the general information of all concerned, as to the progress of the liquidation which has been made up to February 1st. It would seem that a considerable amount of money has been realized and that the estate of Herman Sielcken, whom the Alien Property Custodian is representing, might receive some remittance out of its liquidation. 2829

It may be necessary to await the final completion of the liquidation, but we would like for you to state the facts and the prospects of our receiving check on account at an early date. Please give me a complete statement as to when we may expect at least a partial remittance.

Yours very truly,

C. E. HUNTER
Assistant Manager
General Business Department

CEH-IMB

2830 **Exhibit 4-h, Annexed to Reply Affidavit of Frank C. Sterck.**

General Business Dept.
111 Broadway,
New York

Received, Feb. 6, 1918.
Answered

February 5th, 1918.

Crossman & Sielcken

Mr. G. E. Warren,
Columbia Trust Co.
60 Broadway,
New York City.

2831

Dear Sir:

We have received the following communication from Washington.

"This being the 4th of the month, it would be well to inform the various companies under liquidation under our supervision, or those continuing in operation, that we expect the usual monthly reports by the 10th ints."

Will you kindly see that a report of the Company which you are supervising is handed to us as quickly as possible.

2832 If we mistake not, we mailed to you a short time ago, instructions as to how this report was to be made out.

If these instructions are carefully followed, it will facilitate matters in Washington considerably.

Very truly yours,

Manager, New York Office
General Business Dept.

BOK:R

Exhibit 4-i, Annexed to Reply Affidavit of Frank C. Sterck. 2833

COLUMBIA TRUST COMPANY

Sixty Broadway

New York

February 19, 1918

F. J. Horne, Esq.
Department of Trusts,
Alien Property Custodian,
19th and P Streets,
Washington, D. C.

Alien Property Custodian
Received, Feb. 20, 1918.
Noted date
Answered H. T. H. date Feb. 20.
Report No. Trust No. 1. 2834

Dear Mr. Horne:

As you know, the Columbia Trust Company is liquidating the firm of CROSSMAN & SIELCKEN as Executor of the SIELCKEN estate, all of the assets of the firm belonging to the Sielcken Estate, the liquidation being carried on by us under a license issued by the War Trade Board January 21, 1918, No. ET-7463 and by a license issued to Sorenson and Nielsen, the surviving partners as liquidators, being license No. ET-7454.

The only complication we have run up against so far is in collecting a scrip certificate of the Atlantic Mutual Insurance Company, which they refuse to pay to us owing to the fact that you have notified them that the money should be paid only to your representative. Will you therefore kindly write the Atlantic Mutual and advise them that any moneys properly due to Crossman & Sielcken may be paid by check drawn to the order of Crossman & Sielcken delivered either to the liquidators, Sorenson & Nielsen, or the Columbia Trust Company. I believe there are other scrip certificates maturing in the future and it might be well to have this apply to the ones that are not yet due, as well as the one in question. 2835

I am sorry to have to trouble you, but this seems to be the only way that the Atlantic Mutual will pay over the funds.

With kind personal regards, I am

Yours very truly,

G. E. WARREN
Vice-President

2836 **Exhibit 4-j, Annexed to Reply Affidavit of Frank C. Sterck.**

Re: Trust F-1-H

Div. of Corporations

February 20, 1918.

Crossman & Sielcken

The Columbia Trust Co.,
60 Broadway,
2837 New York City.

Gentlemen:

Your favor of the 19th instant, regarding a Scrip certificate of the Atlantic Mutual Insurance Company, has been duly received.

The Atlantic Mutual Insurance Company advised us by letter dated February 8th, that application had been made to them for the collection of the certificate by "people" who stated it was their intention to pay the money over to us when collected. We merely advised them that the firm of Crossman & Sielcken was in process
2838 of liquidation under the supervision of this office and that payments should be made only to our representatives. They, evidently, misunderstood our letter, and we have written them today, a copy of which we herewith enclose. We have no doubt but that this letter will straighten out the matter.

Very truly yours,

Ass't Director, Bureau of Trusts.

Enc. (1)

HTH:MR

Exhibit 4-k, Annexed to Reply Affidavit of Frank C. Sterek. 2839

In replying address only
The Alien Property Custodian
and refer to No.

Tr. No. F-1-H

ALIEN PROPERTY CUSTODIAN

Sixteenth and P Streets NW,

Washington, D. C.

Div. of Corporations 2840

February 20, 1918

Crossman & Sielcken

Atlantic Mutual Insurance Co.,
51 Wall Street,
New York City.

Gentlemen:

You have evidently misunderstood our letter of the 12th instant. We advised you in that letter that payment of certificates of Scrip, standing in the name of Crossman & Sielcken, should be made only to our representatives in the liquidation of the firm of Crossman & Sielcken. This firm is being liquidated under licenses of the War Trade Board issued to Sorenson and Nielsen, and the Columbia Trust Co. under our supervision, so that it is proper for payment to be made to the liquidators. 2841

We trust this letter will straighten out the misunderstanding that appears to have arisen between you and the Columbia Trust Co.

Very truly yours,

Ass't Director, Bureau of Trusts.

HTH:MR

2842 **Exhibit 4-I, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Trust File #1

Alien Property Custodian
Received Feb. 25, 1918
2843 Noted Date
Answered Date
Report No. Trust No.

February 23, 1918.

F. J. Horne, Esq., Asst. Director,
Bureau of Trust, Alien Property Custodian,
16th and P Sts., Washington, D. C.

Dear Mr. Horne:

Trust No. F-1-H

2844 Thank you very much for your favor of the 20th instant enclosing copy of the letter you have written to the Atlantic Mutual Insurance Company in regard to the payment of certain scrip registered in the name of Crossman & Sielcken. Your prompt attention is appreciated.

Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

Exhibit 4-m, Annexed to Reply Affidavit of Frank C. Sterck. 2845

Please Address
Post Office Box 6
Wall St. Station
New York

ATLANTIC MUTUAL INSURANCE COMPANY,
Atlantic Building,
49 & 51 Wall Street,
New York. 2846

Cable Address,
"ATLANTIC,"
New York.

1180694-G New York, February 23, 1918.

Alien Property Custodian
Received Feb. 25, 1918
Noted Date
Answered Date

Trust File

Alien Property Custodian,
Washington, D. C. 2847

Dear Sir:

Your No. Tr. No. F-1-H

Your letter of 20th instant has been received advising with respect to scrip standing in the name of Crossman & Sielcken on our books that we are under a misapprehension as to the requirements of your office. We note that Messrs. Sorenson and Nielsen and the Columbia Trust Company are the Liquidators of Crossman & Sielcken and that it will be in order for us to make payment of the scrip to the liquidators. We thank you for this information and we shall be governed accordingly.

Respectfully yours,

CORNELIUS ELDERT,
President

2848 **Exhibit 4-n, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Trust #1

Hold

May 7, 1918

F. J. Horne, Esq., Director,
Bureau of Trusts,
2849 Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received May 8, 1918
Noted Date
Answered W. L. W. Dated 5/8

Dear Mr. Horne:

Sometime in October, 1917, Crossman & Sielcken in Liquidation, paid to the Alien Property Custodian the sum of $100,000, being an advance payment. At that time it was not know that HERMANN SIELCKEN had died. Now that Columbia Trust Company has qualified as his Executor, this payment will have to be included as an asset of his estate, either as a claim against the Alien Property Custodian or as an advance distribution.

2850 The easiest way to handle it would appear to be to consider it an advance distribution, and in order that it may be so included in our accounts, I am writing to ask if you could have the enclosed receipt signed, acknowledging the payment of this sum.

With kind personal regards,

Yours very truly,

G. E. WARREN,
Vice-President

gew.dw

Exhibit 4-o, Annexed to Reply Affidavit of Frank C. Stepek. 2851

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Alien Property Custodian
Received May 24, 1918
Noted Date
Ans'd Date
Report No. Trust No.

2852

May 23, 1918

F. J. Horne, Esq., Chief,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

R 4940
17412

Dear Mr. Horne:

TRUST NO. 1

We are in receipt of your favor of *the 18th instant* in reference to the payment of $100,000 made by Crossman & Sielcken in Liquidation to the Alien Property Custodian, and more especially in reference to our request for a receipt. 2853

You evidently misunderstand what we desire. This money was paid over to the Alien Property Custodian last October by Crossman & Sielcken in Liquidation, and a receipt was given to Crossman & Sielcken. Now that the Columbia Trust Company is qualified as Executor, this $100,000 becomes an asset of the Sielcken Estate and we must either claim the asset and endeavor to collect it (which we would do were it not for the fact that the money, being in the hands of the Alien Property Custodian, is in the hands of the party to whom we will account), or else we will have to show it in our accounts as an advance distribution, and it seems

2854 *Exhibit 4-o Annexed to Reply Affidavit of Frank C. Sterck*

foolish to bring an action to collect this amount and then turn it back to you.

In order to avoid all this and to straighten our accounts as we must show the disbursement of this money as Executor, we have forwarded to you a receipt acknowledging the receipt of this money from the estate, which would appear to be perfectly proper. I had taken this matter up with Judge Mann before passing the receipt on to you. I trust you will see your way clear to straightening this out for us.

2855 Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

Exhibit 4-p, Annexed to Reply Affidavit of Frank C. Sterck.

Trust No. F-1.
Division of Corporation

2856 June 6, 1918.

Messrs. Crossman and Sielcken,
90 Wall Street,
New York City.

R-10471

Gentlemen:

Enclosed herewith is a formal Acquittance for $100,000.00 paid by you to this office on October 26, 1917.

Very truly yours,

F. J. HORNE,
Director, Bureau of Trusts.

PS-H
Enclosure.

Exhibit 4-p Annexed to Reply Affidavit of Frank C. Sterck 2857

RECEIPT OF ALIEN PROPERTY CUSTODIAN

Not Negotiable

Each and every schedule that may be attached to this receipt must be signed by the Alien Property Custodian, with his seal of office affixed, in order to be of any validity.

This receipt is issued in pursuance of the following provisions of section 7 (*e*), "Trading with the enemy Act": 2858

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the alien property custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The alien property custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the alien property custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into the possession of the alien property custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee." 2859

This instrument witnesseth: That I, A. Mitchell Palmer, duly appointed and qualified as Alien Property Custodian, under the authority and in pursuance of the Act of Congress known as the "Trading with the enemy Act," approved October 6, 1917, do hereby receipt for and acknowledge the payment, conveyance, transfer, assign-

2860 *Exhibit 4-p Annexed to Reply Affidavit of Frank C. Sterck*

ment, and delivery by Crossman and Sielcken, Address: No. 161-67 (Street.) Maiden Lane (City.) New York City (County.) (State.) New York, of the following money or property:

The sum of one hundred thousand dollars ($100,000.00), which money or property has been so paid, conveyed, transferred, assigned, and delivered to said Alien Property Custodian, as the money or property of an enemy or ally of enemy, or one whom there may be reasonable cause to believe to be an enemy or ally of enemy, to wit:

2861 Herman Sielcken, Address: Baden, Baden Germany.

To be by said Alien Property Custodian held, administered, and accounted for as provided by law.

Witness my hand and seal of office this sixth day of June, 1918.

Division of Accts. Credit Ticket No. 1.

Check deposited in U. S. Treasury Oct. 26, 1917.

A. MITCHELL PALMER
Alien Property Custodian.

2862 By HD
Managing Director.

Exhibit 4-q, Annexed to Reply Affidavit of Frank C. Sterck. 2863

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

October 1, 1918

R 17412

TRUST I

Hon. A. Mitchell Palmer, 2864
Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received Oct. 2, 1918
Noted J. S. B. Date 10/4/18
Ans'd Date

Dear Mr. Palmer:

For your personal information, you may be interested to know that in connection with the liquidation of the estate of Hermann Sielcken, the Columbia Trust Company as Executor, has invested $2,000,000 in U. S. Government certificates of indebtedness. 2865

We expect to proceed as rapidly as possible to file our accounting and to ask for a decree enabling us to make a partial distribution, which I assume will involve the payment of something over $2,000,000 to the Alien Property Custodian.

Very truly yours,

G. E. WARREN,
Vice-President.

gew.dw

C. & P. Trusts
Oct. 3, 1918
Desk No. 2 J. S. B.

2866 **Exhibit 4-r, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

Paste this on the face
of your letter
C. & P. Trusts
Haydon

2867

Alien Property Custodian
Received Nov. 2, 1918
Noted Date
Ans'd J. S. B. Date 11/20/18

November 1, 1918

Alien Property Custodian
Division of Court and Private Trusts,
Washington, D. C.

C. & P. Trust
Nov. 2, 1918
Desk No.

2868 *Attention of Mr. W. C. Balderston*

Dear Sir:

I am in receipt of your favor of the 30th ultimo in reference to Report 17412, Trust No. C-1.

We are now preparing our account as Executor of the Estate of HERMANN SIELCKEN. As this is a very complicated account, it will take several weeks before it will be in shape for filing in the Surrogate's Court.

We have now under way transfer tax proceedings in the State of New York, to determine the amount of the inheritance tax. As the Alien Property Custodian is the chief beneficiary under the Will, he will receive due notice of all proceedings in the accounting. As a matter of fact, our purpose in bringing the accounting now is to obtain the Alien Property Custodian's approval of all transactions to date.

Very truly yours,

G. E. WARREN,
Vice-President.

Exhibit 4-s, Annexed to Reply Affidavit of Frank C. Sterck. 2869

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

May 13, 1919

Alien Property Custodian
Received May 15, 1919
Noted Date
Ans'd H. E. A. Date 5/19/19 2870

Henry E. Ahern, Esq., Managing Director,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

Dear Mr. Ahern:

I am asking if you will give your personal attention to the enclosed correspondence and give us the benefit of your opinion. The letters enclosed give the history of the case, which is an indebtedness of the estate of George C. Boldt to the Sielcken firm. 2871

Of course the estate of George C. Boldt is perfectly solvent and able to pay its claim in full. As far as the firm of Crossman & Sielcken is concerned, there are no offsets. Judge Mann has written Mr. Garvan in this connection informally approving of a settlement. It does not appear to us, however, as executor, that we have sufficient warrant to effect a settlement of this claim, knowing that the books show no offsets and that the Boldt Estate is fully able to make complete payment. Our inclination would be to have a judicial settlement, making the Boldt Estate prove any counterclaims they may have in the regular way, rather than to offhand effect a compromise. Of course in view of the size of the Sielcken estate every dollar that is compromised results in the loss to the United States Government of about

2872 *Exhibit 4s Annexed to Reply Affidavit of Frank C. Sterck*

twenty cents in the federal estate tax, as this estate comes in the twenty cent class.

In this connection, I would also like to have your ideas on the question of certain accounts due the estate of Herman Sielcken from enemy aliens located in Germany, amounting to several hundred dollars. Do you not think it would be possible to assert these claims against funds held by the Alien Property Custodian as a general claim of an American citizen (that is, considering the Sielcken Estate in the hands of an American citizen) and endeavor
2873 to collect these claims in the same way that similar accounts will be taken care of? It is true that any amount collected will be eventually turned over to the Alien Property Custodian when the estate is settled, but in enforcing such claims, the federal government will benefit by about 20% of the amount recovered in the way of a federal estate tax, and the State of New York will also receive its share of any amounts so collected.

With kind personal regards,

Yours very truly,

G. E. WARREN,
Vice-President.

2874 gew.dw

Exhibit 4-t, Anneexd to Reply Affidavit of Frank C. Sterck. 2875

TC-1-
R 17412

May 19, 1919

George E. Warren, Esq., Vice President
Columbia Trust Company
60 Broadway
New York City

Dear Mr. Warren:

2876

I have carefully gone over your favor of the 13th inst. and your enclosures relative to indebtedness from the Estate of George C. Boldt to the Sielcken firm.

On the statements in Mr. Sorenson's letter I should not think that the executor would be justified in making the settlement proposed. The Alien Property Custodian is of course interested in having the estate closed and the proceeds thereof remitted, but does not interfere with the administration, so that the expression above is my opinion and is not in any sense a direction from this office, the attitude of this office being that it should not give instructions to administrators who are acting under State laws.

2877

The last paragraph of your letter refers to amounts due the Estate of Herman Sielcken from enemy aliens located in Germany. I have consulted our Bureau of Law about this and am informed that it is in order for the executor to file Notices of Claims against property taken over by the Alien Property Custodian, providing that the Alien Property Custodian holds funds which were taken as the property of the debtors. That is, such Notices of Claim cannot be considered unless some properties of the enemies named therein are actually in possession of the Alien Property Custodian. You are of course familiar with the terms of Section 9 of the Act.

Couldn't you send us a few million dollars as a distribution on account of this estate?

With kindest regards, I am,

Yours very truly,

Director—Bureau of Trusts.

HEA/AS

2878 **Exhibit 4-u, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

May 20, 1919

Henry E. Ahern, Esq., Director,
Bureau of Trusts,
Alien Property Custodian,
2879 Washington, D. C.

Alien Property Custodian
Received May 22, 1919
Noted J. S. B. Date 5/22/19
Ans'd Date

Dear Mr. Ahern:

I am in receipt of your favor of the 19th instant, in reply to my letter of the 13th, and am glad to note that you agree with our ideas in regard to the settlement of the claim against the estate of the late George C. Boldt.

With regard to your second paragraph, the claims of the SIELCKEN ESTATE against enemy aliens unfortunately cannot be asserted against any funds in possession of the Alien Property Custodian, as I understand no accounts were taken over from these several parties. We
2880 will endeavor to file a proper claim with the Department of State for settlement under the Peace Treaty.

We are hoping to be prepared to make a distribution in a short time, and our accounts are nearly ready for filing with the Surrogate. I assume the Surrogate will enter a decree authorizing a partial distribution. The executor will of course have to withhold a considerable sum until certain pending litigation is cleared up, and the federal and state taxes are determined. These are held up on account of the doubt as to the value of the accounts due from enemy aliens, and I assume cannot be determined until after communication is free with Germany.

With kind regards,

Yours faithfully,

G. E. WARREN,
G. E. Warren,
Vice-President.

gew.dw

Exhibit 4-v, Annexed to Reply Affidavit of Frank C. Sterck. 2881

Oct. 18, 1919

Trust No. BL-C-1
Report No. 2139-40
File #00364-K.

Morgan M. Mann, Esq.,
24 Broad Street,
New York City.

Estate of HERMANN SIELCKEN. 2882

Dear Sir:

Some time ago you advised the writer personally that a distribution of perhaps $2,000,000 would be made in this estate some time in October. Will you kindly advise this office whether any disposition has been made and if not when a distribution is to be expected?

Very truly yours,

BUREAU OF LAW.
By

FBG/HMS.

2883

2884 **Exhibit 4-w, Annexed to Reply Affidavit of Frank C. Sterck.**

COLUMBIA TRUST COMPANY

SIXTY BROADWAY

New York

C. & P. Trusts
Oct. 23, 1919
Desk No.

October 22, 1919

2885 Walter U. Varney, Esq., Asst. Chief,
Bureau of Trusts,
Alien Property Custodian,
Washington, D. C.

Alien Property Custodian
Received Oct. 23, 1919
Noted J. S. B. Date 2/3/20
Ans'd Date

Report No. 7814 Trust C-1

Dear Sir:

I am in receipt of your favor of the 18th instant in which you refer to Report No. 7814 Trust C-1.

The balance to the credit of the late HERMANN SIELCKEN, which was reported to you in 1917, has been taken over by the Columbia Trust Company as executor of his estate, together with all the assets of the firm of Crossman & Sielcken of which he was a member.

2886

The progress of the liquidation of this estate has been reported to your office by your accountants, Arthur Young & Company, each month. The executor has filed intermediate accounts and the Alien Property Custodian is cited as an interested partner and is represented by your attorney, Mr. Morgan M. Mann, 15 Broad Street, New York City.

Very truly yours,

G. E. WARREN,
G. E. Warren
Vice-President.

gew.dw

Exhibit 5, Annexed to Reply Affidavit of Frank C. Sterck. 2887

ALIEN PROPERTY CUSTODIAN

Designation of Depositary

By virtue of the authority vested in me by order of the President dated October 29, 1917, "Executive Order fixing salary of and vesting certain power and authority in the Alien Property Custodian appointed under "Trading with the enemy Act," and in pursuance of the provisions of "An Act to define, regulate and punish trading with the enemy," approved October 6, 1917, 2888

I, A. Mitchell Palmer, Alien Property Custodian, hereby designate Columbia Trust Company of the City of New York, State of New York, as depositary of property of enemies or allies of enemies, a bond as required by law having been executed and filed by said depositary, to have the following authority and powers, subject to the following conditions and limitations, viz:

I. Powers.

To collect and receipt for any dividends or interest or income that may become due in respect of such property; 2889

To collect and receipt for any maturing obligations held by it for my account as such custodian;

To demand, receive and receipt for any moneys due or to become due on account of such property;

To lease and to renew leases, from time to time, of any of the real estate included in said property, for no longer term, however, than one year (unless with the express consent of the Alien Property Custodian had and obtained), to such persons and upon such terms as to said depositary may seem best, and to cancel, forfeit, and annul, in case of default, in accordance with the terms thereof, any lease or leases now or hereafter made;

To contract for and incur only such expense in connection with said property as may be necessary to prevent waste and protect such property, to the end that the interests of the United States in such property and

2890 *Exhibit 5 Annexed to Reply Affidavit of Frank C. Sterck*

rights, or of such person as may ultimately become entitled thereto or to the proceeds thereof, may be preserved and safeguarded;

To pay taxes and assessments, ordinary as well as extraordinary, levied or assessed upon said property, and all repairs and other expenses necessary to prevent waste and to protect such property, as hereinbefore stated;

To effect insurance of such necessary and proper kinds and in such amounts and in such companies as said depositary shall deem best and proper;

2891 Subject to the supervision of the Alien Property Custodian and to the limitations herein expressed, to manage such property and do any necessary acts or things in respect thereof and exercise any rights which may be or become appurtenant thereto or to the ownership thereof.

The depositary may in emergency, and in the absence of funds of a trust in its possession, advance funds for the cost of any of the foregoing expenses of such trust, and may charge interest on the funds so advanced, its repayment, however, to be made from the funds of such trust later available, but from no other source.

2892 II. LIMITATIONS.

This designation and authority is, however, subject to the following conditions and limitations, viz:

That said depositary shall from time to time execute, file, and maintain with the Alien Property Custodian such additional bonds as in the judgment of the Alien Property Custodian will be sufficient to protect the property from time to time on deposit with such depositary, such bonds to be conditioned as the Alien Property Custodian may direct;

That said depositary shall not—

(a) Reinvest any of the moneys received by it, nor the proceeds of any obligations coming into its possession hereunder, nor the proceeds of the sale of any property made;

(b) Sell or dispose of any real estate, securities, choses in action, or other property coming into its possession hereunder, except pursuant to specific authority therefor given by the Alien Property Custodian;

(c) Institute any legal proceedings, by suit or otherwise, except pursuant to specific authority therefor given by the Alien Property Custodian;

(d) Incur for charge to, or charge to, any trust in its possession hereunder any expense or obligation for legal services rendered to for or by said depositary, except pursuant to specific authority therefor given by the Alien Property Custodian; 2894

That said depositary shall at all times hold subject in all respects to the order of the Alien Property Custodian all property at any time and from time to time coming into its possession hereunder;

That this designation as depositary is subject to revocation at any time by the Alien Property Custodian, said depositary shall forthwith pay and deliver to the Alien Property Custodian any and all such property, free of any lien of said depositary for compensation for its services.

2895

III. ACCOUNTING.

All moneys collected from payment of principal of maturing obligations, and proceeds from the sale of real estate or other property, shall be immediately remitted to the Alien Property Custodian, or paid and deposited forthwith by said depositary into the Treasury of the United States, as the Alien Property Custodian shall direct.

Said depositary shall transmit to the Alien Property Custodian on the first days of March, June, September, and December of each year, or as soon thereafter as may be, fully itemized statements of its receipts and disbursements separately in respect of each trust in its possession hereunder, for the three months preceding such statement; each statement shall also contain a full and com-

2896 *Exhibit 5 Annexed to Reply Affidavit of Frank C. Sterck*

plete inventory of the property of such trust in its possession at the end of each quarterly period.

Said depositary on the 1st day of December of each year, or as soon thereafter as may be, shall remit to the Alien Property Custodian the net income in its possession hereunder on the 30th day of November preceding.

IV. COMPENSATION OF DEPOSITARY.

Said depositary shall receive for its services hereunder in connection with each trust a reasonable compensa-
2897 tion.

In WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 31st day of December, 1917.

A. MITCHELL PALMER,
Alien Property Custodian.

2898

Exhibit 5-a, Annexed to Reply Affidavit of Frank C. Sterck. 2899

DUPLICATE

This should be returned to

ALIEN PROPERTY CUSTODIAN

APC Form No. 16B

ALIEN PROPERTY CUSTODIAN

Washington, D. C.

2900

Alien Property Custodian
Received Aug. 14, 1918
Noted Date
Ansd Date

DESIGNATION OF DEPOSITARY

By virtue of the executive order of the President of the United States, dated February 26, 1918, prescribing rules and regulations respecting the exercise of the powers and authority and the performance of the duties of the Alien Property Custodian under the "Trading with the enemy Act," and prior executive orders pursuant thereto: 2901

I, A. MITCHELL PALMER, Alien Property Custodian, hereby designate Columbia Trust Company of the city of New York, State of New York as depositary, agent, bailee, and attorney in fact (hereinafter called Depositary) of money or other property of enemies or allies of enemies.

The said Depositary shall have the following powers and duties, subject to the following conditions and limitations:

I. POWERS AND DUTIES.

Service of demands and receipt and holding of property for the account of the Custodian.

1. To serve demands and to receive and give receipt for the conveyance, transfer, assignment, delivery and

payment, made pursuant to demands, of any money or other property owing or belonging to, or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy, as and when the Alien Property Custodian may direct, and to hold the same for the account of the Custodian.

Collection of income.

2. (a) To collect and receive any and all moneys (including checks and drafts payable on demand) that have
2903 or may become due as dividends, interest, or income on any stock, bonds, notes, time drafts, time bills of exchange, or other securities or property held by said Depositary for the account of the Alien Property Custodian.

(b) To collect and receive all subscription rights, dividends, and other distributions and payments of income declared or made on account of stock, shares, certificates representing beneficial interests, bonds or other securities regardless of whether or not the same be in the possession of the Depositary, and regardless of whether or not the same have been transferred to the Alien Property Custodian upon the books of the corporation, association, com-
2904 pany, or trustee issuing the same, all as and when the Alien Property Custodian may direct.

Collection of principal.

3. (a) To collect and receive any and all moneys that have or may become due as the proceeds of any and all maturing obligations held by said Depositary for the account of the Alien Property Custodian, including as principal for such purpose any income which was past due at the time of the service of the demand therefor.

(b) To collect and receive all subscription rights, dividends, and other distributions and payments of capital declared or made on account of stock, shares, certificates representing beneficial interests, bonds, or other securities regardless of whether or not the same be in the possession of the Depositary, and regardless of whether or not the

same have been transferred to the Alien Property Custodian upon the books of the corporation, association, company, or trustee issuing the same, all as and when the Alien Property Custodian may direct.

Transfer of corporate stock, etc.

4. To require the transfer of corporate stock, shares, or certificates representing beneficial interests to be made upon the books of any corporation, unincorporated association, company, or trustee issuing the same, into the name of the said Depositary for the account of the Alien 2906
Property Custodian, and in the case of corporate stocks or shares, into the name of any other person, all as and when the Alien Property Custodian may direct.

Receipt of corporate notices, etc.

5. To receive notices issued by any corporation, unincorporated association, company, or trustee, in respect to stock, shares, certificates representing beneficial interests, bonds, or other securities held by said Depositary for the account of the Alien Property Custodian, and to receive notices in respect to such other stock, shares, certificates representing beneficial interests, bonds, or 2907
other securities as the Alien Property Custodian may direct; and further, to notify the Alien Property Custodian promptly of the receipt of any such notices, whereby any action on the part of the Alien Property Custodian might be advisable or necessary.

Sale and delivery of rights appurtenant to ownership of corporate stock, bonds, etc.

6. To sell and deliver any stocks, bonds, notes, or evidence of ownership or indebtedness of any corporate stock, shares, certificates representing beneficial interests, bonds, or other securities, or to make changes, deposits, or withdrawals of the same, all as and when the authority of the Alien Property Custodian is first obtained, but such sale may be made only at public auction (unless the

2908 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

President, stating the reasons therefor, should otherwise determine), and to American citizens.

Sale of commodities, or other tangible property.

7. To sell and deliver any commodity or other tangible property; such sale or delivery to be conducted in all respects as the Alien Property Custodian shall direct; provided that such sale may be made only at public auction (unless the President, stating the reasons therefor, should otherwise determine) and to American citizens, except
2909 that certain classes of tangible personal property enumerated in the Executive Order of April 2, 1918, may be sold at private sale in cases where the market value of the lot belonging to any one trust shall not exceed $10,000; and provided further that no sale of any kind may be made without the authority of the Alien Property Custodian first obtained.

Collection and receipt of proceeds of sale.

8. To collect or receive for the account of the Alien Property Custodian any and all moneys as the proceeds from the sale of any property when such sale is made
2910 pursuant to the conditions and limitations hereinbefore expressed.

Leases.

9. To lease and to renew leases from time to time of real estate in such form as the Alien Property Custodian may direct for no longer term, however, than one year (unless with the express consent of the Alien Property Custodian first obtained), to such persons and upon such terms as to the said Depositary may seem proper.

Expenses, taxes, insurance, and general management.

10. To contract for and incur only such expense in connection with any property, real or personal, as may be necessary to prevent waste and protect said property to the end that the interests of the United States in said

property and rights, or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded.

11. To pay taxes and assessments, ordinary as well as extraordinary, that have been or may be levied or assessed upon any property, real or personal, held for the account of the Alien Property Custodian.

12. To effect insurance of such necessary and proper kinds upon any property, real or personal, held for the account of the Custodian, and in such amounts and in such companies as said Depositary shall deem best and 2912
proper.

13. To manage any and all property, real or personal, and do any necessary thing or things with respect thereto, and exercise any rights which may become appurtenant thereto or to the ownership thereof, subject to the supervision of the Alien Property Custodian and to the conditions and limitations herein or hereafter expressed.

Advancing funds for necessary expenses.

14. In the case of emergency and in the absence of funds of any trust in the possession of said Depositary, 2913
to advance funds for the cost of any of the foregoing expenses of such trust, and to charge interest on the funds so advanced: *Provided,* That all such expenses shall be paid out of and in any event recorded as a charge against the trust to which such money or other property belongs.

II. Accounting.

1. The said Depositary shall render to the Alien Property Custodian, in such form and as may be required, quarterly separate reports for each trust on the first day of March, June, September, and December, of each year, or as soon thereafter as may be, the reports to include all items received to date, to and including the close of business on the last day of each quarter.

2914 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

2. The said Depositary shall forthwith remit to the Alien Property Custodian on the first day of March, June, September, and December of each year, unless sooner demanded in special cases, together with the quarterly reports required as of those dates, all net income in its possession on the said dates.

3. The said Depositary shall also forthwith remit to the Alien Property Custodian on the first day of March, June, September, and December of each year, unless sooner demanded in special cases, all moneys collected from
2915 the payments of principal of maturing obligations, and principal proceeds from the sale of any commodity or other tangible property, when such sale has been made pursuant to the provisions hereinbefore stated.

4. The said Depositary shall, upon the making or upon the renewing of any lease as hereinbefore provided for, report the same, with all the essential details thereof, forthwith to the Alien Property Custodian.

III. Further Conditions and Limitations.

This designation and authority is subject to the further
2916 following conditions and limitations, namely:

1. Said Depositary shall from time to time execute, file, and maintain with the Alien Property Custodian such additional bond or bonds as the Alien Property Custodian may require.

2. Said Depositary shall not—

(a) Reinvest any of the moneys received by it nor the proceeds of any obligations coming into its possession nor the proceeds of the sale of any property made hereunder.

(b) Sell or dispose of any real estate.

(c) Institute any legal proceedings by suit or otherwise except pursuant to specific authority therefor given by the Alien Property Custodian.

Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck 2917

(d) Incur for or charge to any estate or trust in the possession of the said Depositary any expense or obligation for legal services rendered to, for, or by said Depositary except pursuant to specific authority therefor given by the Alien Property Custodian.

(e) Give proxies in relation to any stock, shares, or certificates representing beneficial interests, unless specifically authorized by the Alien Property Custodian.

3. Said Depositary shall at all times act in all respects subject to the supervision, direction, and orders, general or special, of the Alien Property Custodian, and subject 2918
to any rules and regulations which he may prescribe in relation to all money or other property which at any time may come into the possession of said Depositary, anything to the contrary herein contained notwithstanding.

4. Said Depositary shall receive for its services rendered in connection with each trust such reasonable compensation, and at such periods, as the Alien Property Custodian shall designate, the amount of such compensation to be retained by said Depositary, as earned, out of the funds of the trust in its possession, received by it.

5. This designation shall not go into effect until (1) 2919
a bond in the amount and form prescribed by the Alien Property Custodian has been given by the Depositary and approved by the Alien Property Custodian, and (2) until this designation is accepted in the form herein provided, pursuant to a resolution of the board of directors or duly authorized committee of the Depositary.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 30th day of July, nineteen hundred and eighteen.

ALIEN PROPERTY CUSTODIAN,
By J. H. S.
Managing Director.

2920 *Exhibit 5a Annexed to Reply Affidavit of Frank C. Sterck*

Pursuant to a resolution passed the 8th day of August, 1918, by the Executive Committee of the undersigned, Columbia Trust Company the Depositary above designated, such designation is hereby accepted this 8th day of August, 1918, subject to all the conditions and limitations therein contained, a bond as required having been executed by the undersigned, and approved by and filed with the Alien Property Custodian.

COLUMBIA TRUST COMPANY,
(Name of depositary.)
2921 By L. W. WIGGIN,
Secretary.

[Seal.]

(Executed in duplicate.)

2922

Exhibit 5-b, Annexed to Reply Affidavit of Frank C. Sterck. 2923

A. P. C. Form No. 14.

(Copy)

ALIEN PROPERTY CUSTODIAN

BOND OF DEPOSITARY.

The Following Rules Must Be Observed In The Execution Of Bonds:

2924

1. A corporate surety company duly qualified under the act of Congress of August 13, 1894, as amended by the act of March 23, 1910, may be accepted as sole surety, in amounts not exceeding one-tenth of its capital and surplus on any one bond.

2. The full name and residence of principal and surety must be clearly written in the body of the bond.

3. The bond must bear date as of the day upon which it was actually executed.

4. Evidence of the qualification of a surety company under the regulations of the Treasury Department of the United States, and of the authority of its officers or agents executing the bond on its behalf must be filed with the Alien Property Custodian, *but must not be attached to the bond.* 2925

5. If the principal is an incorporated company, the person executing the bond in its behalf must be duly authorized by such company to make, execute, and deliver such bond and to affix or have affixed thereto the corporate seal of the company, and a certificate as to such authority by the secretary of said company, under its seal must be furnished.

6. If the bond is given by persons composing a firm or partnership, each member of the firm must execute it personally; but if any member of the firm be unable to personally execute the bond, it may be executed in his behalf by an attorney-in-fact, duly authorized by power

2926 *Exhibit 5b Annexed to Reply Affidavit of Frank C. Sterck*

of attorney under seal, which power, or a certified copy thereof, must accompany the bond. The names of all persons composing the firm must appear in the body of the bond, as, for example, "A, B, and C, composing the firm of A, B, & Co."

7. Each signature must be made in the presence of two persons who must sign their names as witnesses.

8. All erasures and interlineations must be noted above the signatures of the witnesses as being made before the execution of the bond.

2927

If it is desired to furnish bond with individual sureties, apply to Alien Property Custodian for instructions.

KNOW ALL MEN BY THESE PRESENTS that we, Columbia Trust Company of New York, N. Y., as principal, and American Surety Co. of New York, a corporation of the state of New York, as surety, are held and firmly bound unto A. MITCHELL PALMER, Alien Property Custodian, and to his successors in office in the sum of One Thousand dollars ($1,000), for the payment of which well and truly to be made, we bind ourselves jointly and severally, our joint and several successors and assigns, firmly by these presents.

2928 WITNESS the corporate seals of the parties hereto, duly attested. Dated, the 28th day of Dec., 1917.

THE CONDITION OF THIS OBLIGATION IS SUCH that, whereas Columbia Trust Company has been designated as a depositary under the provisions of section 12 of the act of Congress entitled "An act to define, regulate, and punish trading with the enemy, and for other purposes," and has accepted and agreed to act under such designation,

NOW, THEREFORE, if the said Columbia Trust Company shall truly and faithfully execute and discharge all of the duties imposed upon it as depositary aforesaid as provided by law, and shall faithfully account for and turn over to the Alien Property Custodian all moneys received by it for or on account of said Alien Property Custodian

Exhibit 5b Annexed to Reply Affidavit of Frank C. Sterck 2929

and, whenever required, shall account for, deliver, and turn over to the Alien Property Custodian, or to such person, firm, or corporation as the said Custodian shall direct, or as may be otherwise provided by law, any and all of the property which shall come into its possession by virtue of the designation aforesaid, then this obligation shall be void; otherwise it shall remain in full force and effect.

COLUMBIA TRUST COMPANY

By WILLARD KING
President. 2930

Signed, sealed, and delivered in presence of
O. R. Judd

ATTEST:

L. W. WIGGIN
Secretary.
[Seal.]

ATTEST:
Louis J. Papen
Res. Asst.

AMERICAN SURETY CO. OF NEW YORK 2931

By E. D. SADLER
Res. Vice President.

Depositary's Bond
of

As designated by Alien Property Custodian Dec. 31, 1917.

Examined and passed as to compliance with rules.

W. B. PRIEST,
Manager of Depositaries Section.

2932

Exhibit 5-c.

2933

2934

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EXHIBIT 5-C to REPLYING AFFIDAVIT of
FRANK C. STERCK.

APO 24.

ALIEN PROPERTY CUSTODIAN

DESIGNATION OF DEPOSITARY

(To cover specific trust where Depositary already qualified)

To Columbia Trust Co.
New York, N. Y.

By virtue of the authority vested in me by order of the President, dated October 28, 1917, and pursuant to the provisions of the "Trading with the Enemy Act," I hereby designate you as depositary of the property of Hermann Sielcken
of Germany
an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations, contained in the designation of you as depositary hitherto made by me, and dated December 31st, 191 7.

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 31st day of April, 191 8.

A. [illegible]
Alien Property Custodian.

By

[illegible]

EXHIBIT B-D to REPLYING AFFIDAVIT of
FRANK C. STERCK.

APC 84.

A. P. C. Trust No. F-1
Report No. 6017

ALIEN PROPERTY CUSTODIAN

DESIGNATION OF DEPOSITARY

(To cover specific trust where Depositary already qualified)

To Columbia Trust Co.
New York City

By virtue of the authority vested in me by order of the President, dated October 29, 1917, and pursuant to the provisions of the "Trading with the Enemy Act," I hereby designate you as depositary of the property of Herman Sieloken, (Deceased)
of Baden Baden, Germany
an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations, contained in the designation of you as depositary hitherto made by me, and dated Dec. 21, 1917

IN WITNESS WHEREOF, I have hereunto set my hand at Washington, District of Columbia, this 6th day of April, 1918

A. MITCHELL PALMER
Alien Property Custodian.

By
Manager Depositary Section

2938 **Exhibit 5-e, Annexed to Reply Affidavit of Frank C. Sterck.**

APC 94. A. P. C. Trust No. C-1
Report No. 17412

ALIEN PROPERTY CUSTODIAN

Designation of Depositary

(To cover specific trust where Depositary already qualified)

2939

To Columbia Trust Company,
New York, N. Y.

By virtue of the authority vested in me by order of the President, dated October 29, 1917, and pursuant to the provisions of the "Trading with the enemy Act," I hereby designate you as depositary of the property of Gustav Diederichsen, Kiel, Germany. Heinrich Diederichsen, Kiel, Germany. Carl Isenberg, Germany. Richard Isenberg, Germany. Heinrich Seidel, Baden-Baden, Germany. Lina Kraft, Baden-Baden, Germany. City of Baden, Baden-Baden, Germany. Josephine Heim Hos-
2940 pital, Baden-Baden, Germany. Clara Sielcken, Germany, an enemy, to be held and administered by you, with the authority and powers, and subject to the conditions and limitations contained in the designation of you as depositary hitherto made by me, and dated December 31st, 1917.

Subject to change, you shall receive as compensation for your services rendered in connection with the above trust, ... per cent of gross income collected, to be deducted quarterly at the time of rendering quarterly reports, out of the funds belonging to the trust.

In witness whereof, I have hereunto set my hand at Washington, District of Columbia, this 19th day of October, 1918.

A. MITCHELL PALMER,
Alien Property Custodian.
By H. M. M.
Manager Depositary Section.

TRUST LEDGER

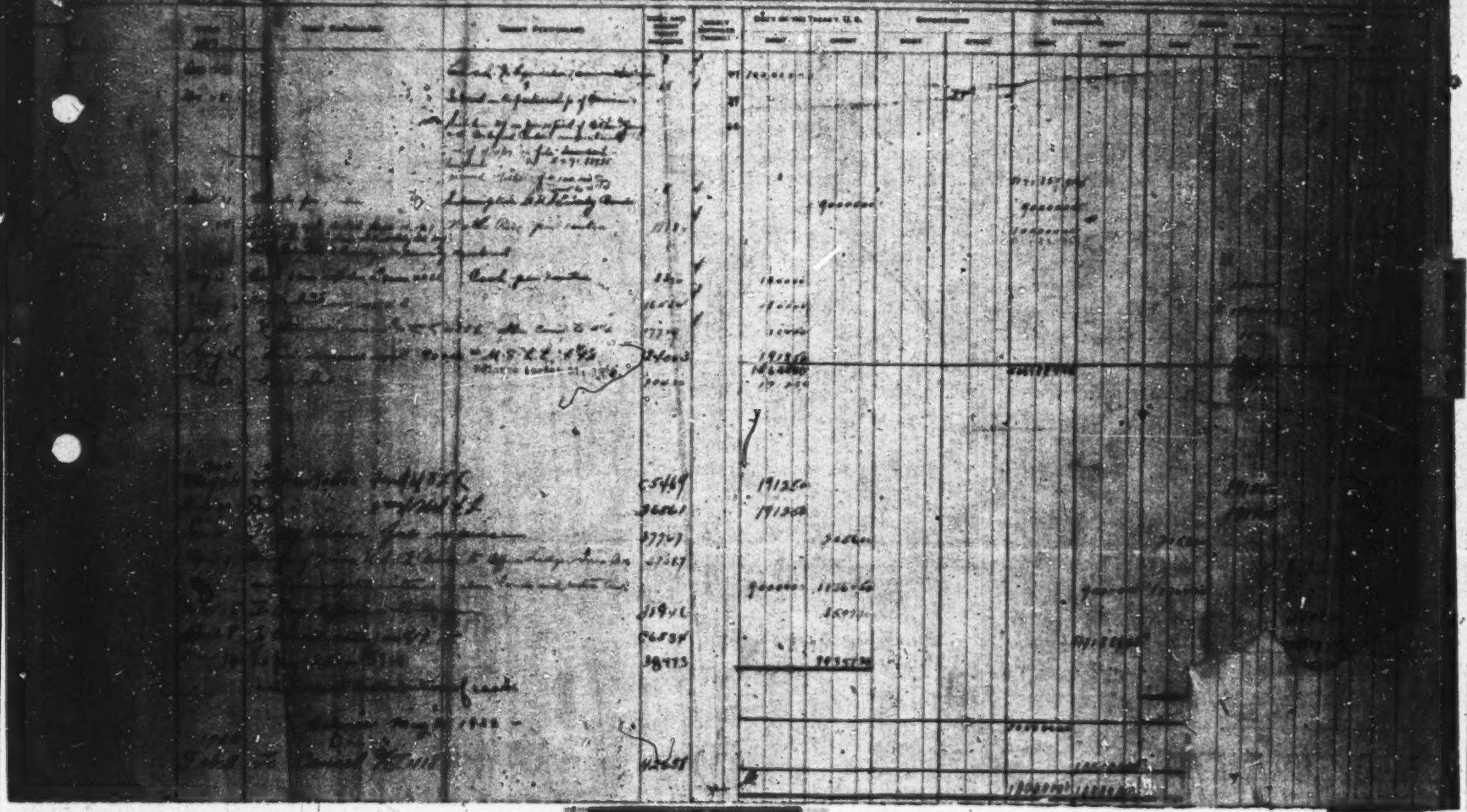
INDIVIDUAL

ACCOUNT OF [redacted] Herman Sieloken

ADDRESS Baden Baden Germany

DEPOSITARY

TRUST No. 1



Tightly Bound

2944

Exhibit 6-a.

2945

2946

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ALIEN PROPERTY CUSTODIAN, WASHINGTON

INDIVIDUAL TRUST LEDGER

Trust No. 4

DEPOSITARY

EXHIBIT C-4.

ALIEN PROPERTY CUSTODIAN

CREDIT TICKET

Herman Seelecker

PARTICULARS

Proceeds of Herman Seelecker Safe Deposit Box

Sec 37 - 40 Fed Reg 304

TOTAL CREDITS

For DEBITS to

Cash with Depositary

Surp of U. S. Treasury 100000

Investments: Stocks

Bonds

Mortgages

Notes Receivable

Accounts Receivable

Real Estate

Misc. Merchandise, etc.

TOTAL DEBITS

Herman Seelecker

Address Newfoundland

Depositary Treasury of U. S.

ADDRESS IF NO SPACE TO SUBSCRIPT

X ENEMY ACCOUNT

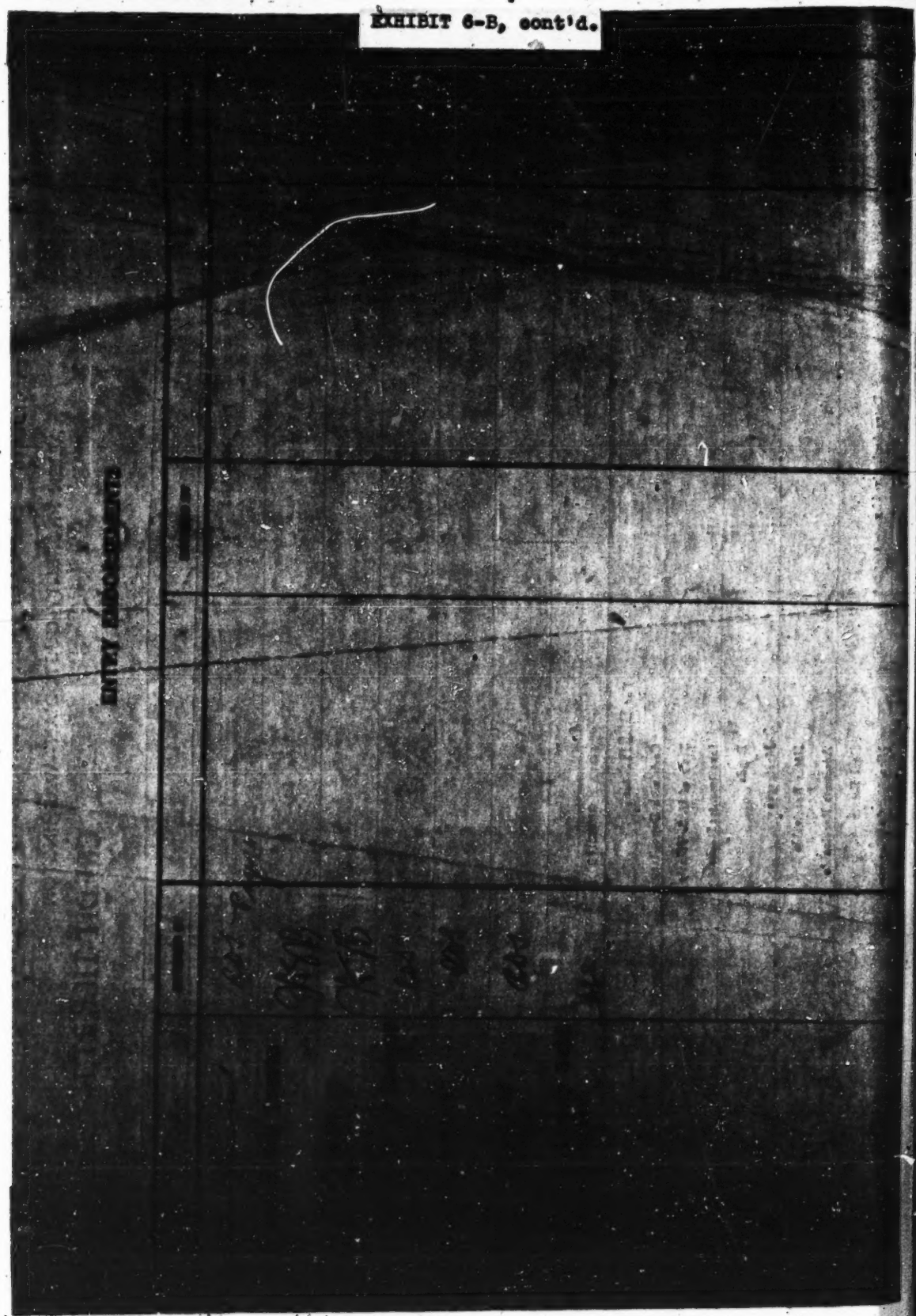
ALLY OF ENEMY ACCOUNT

Entry Authorized by RDS

Chief or Division of Accounts

EXHIBIT 6-B.

EXHIBIT 6-B, cont'd.



ALIEN PROPERTY CUSTODIAN—WASHINGTON

CREDIT TICKET, No. 15

Credit Account of Hermann Dielsken

Date NOV 28 1917

Address

Trust No. 1

PARTICULARS	INVESTMENT	INCOME	CONTINGENT
Interest in Co-partnership of Eversmann & Dielsken by Estate Decedent as at 9/30/17 on his $2,764,869.98 2 1/2% Less remitted 1/2% by the copartnership	100.00.00		57 [illegible]
Entry cancelled C/R 65 34 4-8-21			
TOTAL CREDITS			

EXHIBIT 6-C.

By whom Deposited Eversmann & Dielsken

Address N.Y.

Depositary Eversmann & Dielsken

Address

(MARK X IN SPACE TO DESIGNATE)

	ENEMY ACCOUNT
	ALLY OF ENEMY ACCOUNT

Entry Authorized by

CHIEF OF DIVISION OF ACCOUNTS

For DEBITS to

Cash with Depositary	
Sec'y of U. S. Treas'y	
Investments: Stocks	
Bonds	
Mortgages	
Notes Receivable	
Accounts Receivable	
Real Estate	
Misc. Merchandise, etc.	517 889 98
TOTAL DEBITS	

Reply Affidavit of Harold H. Martin.

2959

(Annexed to Affidavit of Frank C. Sterck of September 15th, 1938.)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

2960

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUF GESELLSCHAFT m. b. H.,

Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

2961

Washington,
District of Columbia, ss:

Harold H. Martin, being duly sworn, deposes and says:

That he has been connected with the American Agency, Mixed Claims Commission, United States and Germany, since its organization in October, 1922; that for some years past he has been the Counsel and the Assistant to the American Agent before said Commission.

According to my best recollection, the first conference that I had in relation to the claims against Germany of Crossman & Sielcken was with Brainard Avery, Esquire, of New York, and R. S. Doyle, Esquire, of Washington, D. C., representing claimants, on March 31, 1927. There is attached hereto and made a part of this affidavit and marked "A," a true copy of a contemporaneous memo-

randum made by me on March 31, 1927, setting out the main facts in relation to the conference.

On November 21, 1928, I had another conference in particular relation to the claim pending before the Commission against the Z. E. G., docket No. 8305. A true copy of my memorandum of November 21, 1928, covering this conference is attached hereto, marked "B," and made a part of this affidavit.

On January 9, 1930, I had another conference with attorneys connected with these claims. A true copy of
2963 my contemporaneous memorandum dated January 9, 1930, covering this conference is to be found set out in full in the affidavit of Frank C. Sterck, dated May 18, 1938, and filed with the moving papers. Copy of this memorandum was sent Brainard Avery, Esquire, on January 14, 1930. There is attached hereto, marked "C," and made a part of this affidavit a true copy of Mr. Avery's letter of January 16, 1930, acknowledging receipt of the memorandum, together with a true copy of my letter of January 20, 1930, to Mr. Avery in relation to his letter of January 16, 1930, marked "D."

On March 15, 1930, Robert W. Bonynge, the American
2964 Agent, wrote me the following letter in relation to the Crossman & Sielcken claims:

"Dear Mr. Martin:

"My understanding of the Crossman & Sielcken matter is if claimant collects judgment against A. P. C., we will dismiss the claim based on the debt of Z. E. G. At the same time we are to have award against Germany for damages due to exceptional war measures in the so-called Willy claim. If Crossman & Sielcken are in any way indebted to Willy or Willy has a claim against them that C & S are willing to compromise that is a matter in which we are not interested and can not be considered in fixing the amount of the award against Germany for damages. Is not this the situation? If so, we must not insist that any award against Germany must not in any way be involved or concerned with the disposition that

C & S may make of the proceeds either of their judgment aganst the A. P. C. or any award they may obtain against Germany."

There is attached hereto and made a part of this affidavit a true copy of such excerpts from my letter of March 17, 1930, replying to Mr. Bonynge's letter of March 15, 1930, as relate to the Crossman & Sielcken matter, marked "E."

On March 17, 1930, I had a conference with the German Agent and representatives of various interested parties at which conference the settlement reached in the conference of January 9, 1930, was modified and a settlement was finally reached on the basis of fifty-fifty. A true copy of my memorandum of March 17, 1930, covering this conference is set out in full in said affidavit of Frank C. Sterck.

On March 18, 1930, the German Agent sent me a memorandum confirming the settlement agreed to in the conference on March 17, 1930, which memorandum reads as follows:

"March 18, 1930

"Mr. H. H. Martin
American Agency.

My dear Mr. Martin,

re Columbia Trust ./. Wille
Docket 8304
Columbia Trust ./. Z. E. G.
Docket 8305

"In reference to our conversation I beg to say that we are now in a position to consider settlement of the above claims by paying fifty (50) percent of the 'Kriegsanleihe'—Claim. Whether or not we shall approve of such settlement will depend upon certain matters, the outcome of which we are waiting to hear.

"I shall let you know at the earliest possible date when we are ready to come to a conclusion.

"Very truly yours,

KARL VON LEWINSKI R.
Agent of Germany"

2968 *Reply Affidavit of H. H. Martin*

The compromise settlement of the Wille claim, docket No. 8304, was reached on the basis of the truthfulness of the allegations contained in the Memorial filed before the Commission by the United States on behalf of claimants and supported by the exhibits accompanying such Memorial. No serious question was ever raised by the respondent government, Germany, to the truthfulness of any of the facts as set out in the Memorial. The compromise figure was arrived at by the Commission on the basis of the agreement signed by the American Agent
2969 and the German Agent, and thus relieved the Commission of determining the correctness of the figures or claims set out in the Memorial. It is my very distinct recollection that Thomas E. Rhodes, Esquire, then of the Department of Justice, attended none of the conferences in the Agency relating to the settlement of any of the Crossman & Sielcken claims, and I have no knowledge that Mr. Rhodes was acquainted with the details of the settlement other than such as is indicated in my memorandum aforesaid of January 9, 1930, in which I said that:

"Mr. Barnes then said that the Department of Justice through Mr. Rhodes was fully advised as to the possible
2970 settlement between the Z. E. G. and the liability of the Sielcken estate under the Indemnity Agreement."

HAROLD H. MARTIN
Harold H. Martin

Subscribed and sworn to before me this
14th day of September, 1938.
Percy F. Allen,
Notary Public.
(Seal)

Exhibit A, Annexed to Reply Affidavit of Harold H. Martin. 2971

(Copy)

MEMORANDUM

March 31, 1927.

Re: Claims against the Government of Germany of the Estate of Hermann Sielcken, deceased, sole owner of the firm of Crossman & Sielcken, New York, and John S. Sorenson and Thorleif S. B. Nielsen, surviving partners of the said firm, List Nos. 636, 6207 and 9406. 2972

Mr. Avery of the firm of Barnes, Avery and Whiting, New York, New York, and R. S. Doyle, Esquire Southern Building, Washington, D. C., called this morning in relation to the above mentioned claims.

I advised these gentlemen that these three claims, together with a fourth claim, No. 10093, involving war risk insurance premiums, signed by the same claimants, were in accordance with letter of February 5, 1924, from Messrs. Munn, Anderson and Munn, Transportation Building, Washington, D. C., formally withdrawn from further consideration before the Commission, and returned to the Department of State on February 8, 1924. 2973

Claims number 636 and 9406, filed in a total amount in excess of $300,000, as disclosed by the petitions, involved cargoes seized from various vessels by the British authorities before the entry of this country into the war. These seizures, as I understand, were made on the theory that the property involved, "fat-backs," were goods consigned to an enemy country. A claim of this character would not be, as I told these gentlemen, a claim against Germany, under the Treaty, although they might possibly have a claim against Great Britain, based on an unlawful seizure of the goods.

As I understand, however, from the investigations recently made by Mr. Avery and Mr. Doyle, it may be

2974 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

that a claim may be developed against Germany, predicated on the failure of the purchaser of the goods involved to pay the firm of Crossman and Sielcken the purchase price of the goods. The purchaser in this instance, it develops, is the so-called Central Purchasing Agency, a German company that is said to have been owned entirely by the German Government.

As I understood from Mr. Avery, the following is a list of the vessels from which cargo was seized by the British authorities, which seized cargo was out through
2975 the British Prize Court:

Dan. Oscar II
Nor. Hildnig
Dan. Arkansas
Dan. Hellig Olav
Swed. Gunborg
Swed. Indianic
Dan. United States

The decisions of the British Prize Court, involving these cargoes, should be found in Lloyd's Prize Cases.

Claim number .6207 was filed as a debt in the amount
2976 of $206,720 said to be due claimant from Theodor Wille of Hamburg. There was filed with the Agency no evidence in support of this claim. However, as I understand the facts from my conversation with Mr. Avery and Mr. Doyle, this claim, in fact, arises out of a joint adventure in the purchase in 1913, of a large amount of Brazilian coffee. The financing of the purchase was apparently accomplished jointly by Sielcken and Wille on a fifty-fifty basis, the purchaser apparently being a German Coffee Firm in Hamburg, P-Z Company. As a result of the transaction the P-Z Company became indebted prior to the beginning of the European War, jointly to Sielcken and Wille in an amount in excess of M. 3,500,000. This debt was not satisfied and in September 1915 a tripartite agreement was apparently entered into between the P-Z Company, Wille and Sielcken, under which a final settlement of the debt was not to be made until

after the war. Whether this means after peace between Germany and Great Britain, or until after peace between Germany and the United States will depend, to a great extent, on the interpretation of the agreement of September, 1915.

Sielcken, who was an American national, with large business interests in this country, Hawaii, The Philippines and Germany, apparently resided at Frankfurt, Germany, from about 1912 to the time of his death in October, 1917. He left surviving him his widow and two children, a son and daughter, each of whom is an American national. The widow and the two children returned to the United States early in 1919, and have since resided, at least the major portion of the time, in this country. 2978

The Columbia Trust Company of New York (now the Irving Bank-Columbia Trust Company) was appointed under the Last Will and Testament of Sielcken, the executor of his estate.

In December, 1918, in accordance with arrangements between Wille and the P-Z Company, which arrangements, Mr. Avery says, were made entirely without the knowledge and consent of the Sielcken Estate, the P-Z Company paid to Wille the entire amount of the joint debt. This payment was made in the form of German War Loan Bonds to the amount of about M. 1,800,000 plus cash to the amount of about M. 700,000. It is not entirely clear just what Wille did with the bonds and money involved. Apparently the first time that the Sielcken Estate knew anything about the settlement was in September, 1921, when Wille wrote Mrs. Sielcken, advising her of the situation. 2979

I told these gentlemen that if the facts as now suggested had been before the Agency prior to the withdrawal of this claim, that I felt a reasonably good chance existed for maintaining a claim under the Treaty.

Whether such a claim might be predicated on a debt due from P-Z Company, would depend, to a great extent,

1. on the terms of the agreement of September, 1915,

2980 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

2. on the authority of Wille in December, 1918, to accept payment of debt prior to the due date, as fixed by the agreement of September, 1915.

If Wille had no authority to accept, on behalf of Sielcken, a discharge of the indebtedness in December, 1918, and if the indebtedness was one under the contract that would fall due prior to July 2, 1921, it would seem that recovery should be affected before the Commission under the Debt Agreement.

If, however, Wille was acting within his rights in ac-
2981 cepting settlement of the debt, on behalf of Sielcken, in December, 1918, I told these gentlemen that I was afraid our best chance to effect a recovery would be on the theory that the property rights and interests of claimants in Germany had been affected by the exceptional war measures of Germany, in that on payment of the debt by P-Z Company, Wille was obligated to transmit to America the Sielcken share of the proceeds. His failure to so transmit was undoubtedly due to the existence of exceptional war measures, that would have prevented Wille in Germany from sending the proceeds of the debt to the Sielcken Estate in the United States. On this
2982 phase of the claim, claimants would be entitled to recover as damages the theoretical difference between the value of the proceeds when paid to Wille in December, 1918, and their value when the exceptional war measures ceased to effect them, which latter date, it would seem, would be some date subsequent to September, 1921, when Wille wrote the Sielcken Estate.

I further told these gentlemen that if they would get together the appropriate evidence, establishing the fact that we could show basis of recovery before the Commission in Number 6207, and also in Numbers 636 and 9406, the Agency might be in a position to ask that these three claims be reinstated, in order that they might be passed on by the Commission.

These gentlemen told me that they would immediately proceed to collect the appropriate evidence as above indicated, and submit it to the Agency on as early a date

as practicable, in order that we might be in a position to know what further steps may be taken in the matter.

I further understand that it will probably be necessary to obtain a portion of the evidence, at least, from Germany. This, of course, will mean that there will be considerable delay in finally submitting the evidence.

With respect to a possible claim against Wille, based on the Debt Agreement, it may be said that the German Agency has always maintained that in claims based upon bank balances and other debts wherein was involved the question as to what is an appropriate credit within the 2984
meaning of the Debt Agreement, the credit must have been derived from a transaction, which, standing by itself would have entitled the claimant to an award thereon, had the amount not been added to increase the sum due and owing, stated as of April 6, 1917. That is, it must involve a pre-war transaction, the obligations arising from which fell due prior to July 2, 1921. If this theory were applied to the instant claim, we find that there was a pre-war obligation arising out of a debt owing from the P-Z Company, a German Corporation, to Wille and Sielcken; that had there been no further actions between the parties, the debt would have fallen due 2985
prior to July 2, 1921; that there was an agreement in 1915, whereby the payment of the debt was postponed; that the debtor anticipated the satisfaction of his obligation, by a payment of the amount owing to Wille. If Wille was empowered to accept payment, this was on the basis of the Agreement of 1915, or some Agreement prior thereto. Therefore, it would seem that the entire transaction was a pre-war one and that, although the P-Z Company may have satisfied its obligation on the date on which it did satisfy this obligation and pay the money to Wille, a German national, a debt fell due from Wille to the claimant or his legal representatives, for which the Government of Germany is obligated to pay under the Treaty.

If, on the other hand, it is established that Wille did not have the authority to accept settlement of this debt

2986 *Exhibit A Annexed to Reply Affidavit of Harold H. Martin*

in so far as relates to Sielcken's interest therein, it may be that we could establish claim on the theory that the debtor having called the debt in December, 1918, and paid it over to an unauthorized person, the creditor is entitled to consider that as a matter of fact the debt, in so far as he was concerned, was not satisfied under the German Law and that accordingly the original German debtor is still obligated to pay the amount thereof to the American creditor.

It is particularly desirable if further action is to be
2987 taken with respect to this claim for claimant to produce the agreement of September, 1915, together with correspondence that may have passed between the parties leading up to this agreement or any correspondence subsequent thereto, explaining its terms.

It will also be desirable for claimant to produce the letter of September, 1921 from Wille setting out the circumstances of the payment by the P-Z Company in December, 1918, together with any correspondence that may have passed between the claimant and Wille prior to and subsequent to the letter of September, 1921, in reference to the payment.

2988 H. H. MARTIN.

Exhibit B, Annexed to Reply Affidavit of Harold H. Martin. 2989

(Copy)

MEMORANDUM

November 21, 1928.

Re: Docket No. 8305 claim of Crossman & Sielcken, from Z. E. G.

I had a conference this afternoon with Brainard Avery, Esquire, C. D. Hamel, Esquire, and R. S. Doyle, Esquire, of counsel for claimants.

After an extended conference on the law and facts 2990
in this claim the conclusion was reached that Mr. Avery is to proceed with the suit filed on behalf of claimants under the Trading With the Enemy Act in the United States District Court for the Southern District of New York, the act of prosecution of which suit was suspended last spring pending negotiations that were under way at that time looking to a settlement of this claim and also the claim under Docket No. 8304.

However before taking further action with respect to this suit Mr. Avery is to write us a letter saying that in view of the breakdown in the negotiations last Spring looking to the settlement of this claim he proposes to now proceed with the suit. On the receipt of this letter a copy 2991
thereof will be submitted to the German Agent for his information.

These gentlemen advised me that they expected to have printed copies of their brief submitted to the Agency in time for filing with the Commission by December 20, 1928. Before the brief in final form is submitted we are to be furnished with draft thereof for such comment and changes as may be deemed appropriate.

We all agreed on the point that the preparation of the brief in this claim should in no way interfere with the progress of the suit.

We further discussed to some extent the question that the point may be raised either in the Commission or in the court that claimant should be put to his election as to which forum he desires to have his rights finally and definitely passed on. It was decided to leave the final determination of this question to the future should the point be raised.

H. H. MARTIN.

2992 **Exhibit C, Annexed to Reply Affidavit of Harold H. Martin.**

(Copy)

Telephone: Rector 1703-1704 Cable Address: Averwhit

AVERY & WHITING

100 BROADWAY

Brainard Avery
2993 Jay E. Whiting
George O. Castell

New York January 16, 1930

H. H. Martin, Esquire,
Counsel U. S. Agency, Mixed Claims Commission,
1511 K Street,
Washington, D. C.

Dear Mr. Martin:

I have to acknowledge with thanks your favor of the
2994 14th enclosing copy of the informal memorandum prepared covering the conference in the office of the United States Agent at Washington on January 9th. Your memorandum appears complete, except that it does not include the tentative negotiation for settling the indemnity given by Sielcken's German executors to Zentral-Einkaufsgesellschaft. Probably this was intentionally omitted by you, as the ZEG indemnity is, I suppose, strictly a matter to be considered and disposed of outside the purlieus of the Commission.

Sincerely yours,

BRAINARD AVERY

A/B

Exhibit D, Annexed to Reply Affidavit of Harold H. Martin. 2995

(Copy)

January 20, 1930.

Brainerd Avery, Esquire,
100 Broadway,
New York, New York.

Dear Mr. Avery:

Receipt is acknowledged of your letter of the 16th 2996
instant, acknowledging my letter of the 14th, enclosing an informal memorandum covering the conference at Washington on the 9th instant in relation to the Crossman-Sielcken claims, Docket Nos. 8304 and 8305.

I purposely did not go into the proposed settlement between the Sielcken Estate and the ZEG of the so-called indemnity agreement other than passing reference thereto as found at pages 3 and 5 of my memorandum, for the reason that this is a matter that does not appear to particularly concern either the American or German Agencies.

Very truly yours, 2997

H. H. MARTIN,
Counsel.

HHM:CMR

2998 **Exhibit E, Annexed to Reply Affidavit of Harold H. Martin.**

(Copy)

(Excerpt from letter dated 3/17-30 from Martin to Bonynge re claims of Crossman & Sielcken, Docket Nos. 8304 and 8305.)

March 17, 1930.

Dear Mr. Bonynge:

I am in receipt of your letter of the 15th instant in relation to the Crossman & Sielcken matter, Docket Nos.
2999 8304 and 8305.

The Wille claim as presented to the Commission has two aspects:

(1) involving a straight pre-war debt from Wille, based on several different book accounts, an item in excess of 6,000,000 Marks that Wille claims to have invested in bonds prior to the war but in regard to which item claimants contend that an examination of the Wille books would probably show that such investment was not made until sometime after the death of Hermann Sielcken and not until sometime subsequent to the Armistice. In the meantime it is the claimants' contention that this money
3000 was used by the firm of Wille in the course of its business;

(2) a debt claimed against the firm of Wille covering the book items with the bond depreciation claim covering the bond item above referred to. This particular phase of the claim is one against the Government of Germany and is anologous to the Estate Decision in that it is our contention that the firm of Wille on the death of Hermann Sielcken was obligated to transmit the bonds to this country in order that the liquidation might be promptly proceeded with under the New York will of Herman Sielcken and the codicil thereto that is executed in Germany not long prior to Hermann Sielcken's death.

In the conference that we had on this matter on January 9th, the proposed settlement was reached on the theory that the book accounts involved in our claim were substantially washed out by counter-accounts of Wille against Crossman & Sielcken leaving for all practical purposes the only item in the claim against Wille, the

one involving the 6,000,000 Marks worth of bonds, which claim the German Agent finally said he would recommend be settled on the basis of 60% thereof with interest from April 1, 1918.

This tentative settlement was reached on the basis that, if it fell through, it was in no manner to affect claimant's right to maintain the claim against Wille as originally filed. If this claim as originally filed is maintained it will of course necessitate going into the question of the debts owing from Wille on the book accounts, together with the questions involved in the so- 3002
called bond account. Going into the book account debts will undoubtedly also involve a determination of the book debts that Wille claims he is entitled to from Crossman & Sielcken. In other words what we are probably entitled to is the net balance, if any, on these book accounts.

The Honorable
Robert W. Bonynge,
50 Broadway,
New York, New York.

3003

One of these book accounts will unquestionably involve a determination of Wille's interest, if any, in the judgment recovered by Crossman & Sielcken against the Z. E. G. In the Z. E. G. transaction Wille claims the right to share in one-half of the profit that would accrue to Crossman & Sielcken in the handling of the Z. E. G. goods. Under the arrangement between Crossman & Sielcken and Z. E. G., Crossman & Sielcken were acting as agents for Z. E. G. and as such they used their money to buy the goods and were entitled to receive from Z. E. G. reimbursement for the cost price plus a commission of 10% plus the other expenses incident to shipment. It is this 10% commission in which Wille claims to have an interest, so that at best the interest of the Wille firm in the Z. E. G. judgment will not be very large.

I am enclosing herewith a copy of a memorandum covering our conference on January 9.

3004 **REPLYING AFFIDAVITS ON BEHALF OF MOVING PARTY.**

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H., Defendants. In Proceedings to Vacate Final Decree of December 30, 1929.	Equity No. 44-28.

3005

3006 City of New York,
County of New York, ss:

Frank C. Sterck, being first duly sworn, deposes and says:

That on September 12, 1938, Mr. Thomas E. Rhodes, a former Special Assistant to the Attorney-General who was in charge of the defense of the instant suit for the Alien Property Custodian and the Treasurer of the United States, conferred with Mr. F. J. McNamara, Special Assistant to the Attorney-General, who handed to Mr. Rhodes a copy of the affidavit of Mr. Brainard S. Avery and copies of the other affidavits filed herein on behalf of the Irving Trust Company, in which reference was made to Mr. Rhodes.

Mr. Rhodes, having conferred with this deponent and Mr. McNamara at the Department of Justice and having

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3007

examined the files of the Department of Justice and the affidavit executed by this deponent and the exhibits annexed thereto, stated that he never knew of any arrangement whereby the plaintiffs were to pay the money received in satisfaction of the decree into a joint account of Brainard S. Avery, attorney for the plaintiff, and Arthur Garfield Hays, attorney for the defendant Z. E. G.; that he did not know that the money or any part thereof was to be paid to anyone other than the plaintiffs herein, John S. Sorenson and Thorleif S. B. 3008
Nielsen, as surviving partners of the firm of Crossman & Sielcken.

Mr. Rhodes further stated that he had no independent recollection of ever having discussed this case at any time with Mr. Brainard Avery but does remember having discussed the case in the early stages thereof, before he had made a study of the case, in an informal manner with Mr. Earl B. Barnes in the Department of Justice in the early part of 1928, at which conference Mr. Avery was present, but Mr. Rhodes said that his recollection was that "Mr. Barnes did all the talking."

Mr. Rhodes further stated that local counsel for the 3009
plaintiffs, Mr. Richard S. Doyle, had conferred with him and had thereafter written to him a letter dated the 7th day of December, 1928, a copy of which letter is hereto annexed and marked Exhibit A; that it had been represented to him at all times after the receipt of said letter that by reason of the decision of Judge Neumann, of the Reich Commercial Court (Affidavit of Brainard S. Avery, Exhibit C), there was no liability whatsoever on the part of the plaintiffs to the Z. E. G.; that he had never been informed by Mr. Earl B. Barnes, Mr. Brainard S. Avery, Mr. Richard S. Doyle, or any of the other deponents that any money was to be paid to the Z. E. G. or to the enemy firm of Theodor Wille; and that the matter was first called to his attention on April 2, 1938, when he examined the files of the Department of Justice at Mr. McNamara's invitation.

3010 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Mr. Rhodes further stated that during the trial of the case he had taken the position that the Alien Property Custodian was merely a trustee of the funds held to the credit of the Z. E. G. trust, No. 592, by the Alien Property Custodian; that the Z. E. G. was a party defendant represented before this Court by able counsel and that he relied upon such counsel, Mr. Arthur Garfield Hays, to protect the fund in the defense of the suit; that he had always thought that Mr. Hays had defended
3011 the case strenuously; that he never conferred with Mr. H. H. Martin or Mr. Bonynge of the American Agency, Mixed Claims Commission, in reference to a settlement of the instant suit or of the Memorials then pending before the Mixed Claims Commission filed against Germany and the Z. E. G. or against Germany and Theodor Wille Company; that, if he had known that any arrangements had been made to recognize any interest or claim of the Z. E. G. or of Theodor Wille in the proceeds of the suit or that any of the money paid in satisfaction of the decree was to be paid to either the Z. E. G. or to the firm of Theodor Wille, he not only would
3012 not have recommended to the Solicitor General that no appeal be taken from the decree, but instead would have raised the issue at the trial of the instant case, or would have thereafter taken appropriate steps in behalf of the United States to prevent such payments.

With reference to the affidavit of William Abramson, dated August 5, 1938, in which Mr. Abramson referred to the conference had by him in the office of Mr. Rhodes of the Department of Justice on March 24, 1930 and in which affidavit (pages 3 and 4), Mr. Abramson states: "And I believe he (Mr. Rhodes) knew that part of the settlement we had arranged was that a considerable payment was to be made to the Z. E. G. in compromise of that claim for indemnity, though I do not recall that I discussed any of the details of the settlement with him," Mr. Rhodes stated that he remembers distinctly that no discussion was had between him and Mr. Abramson, or with anyone else, with regard to any settlement whereby

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto

any part of the proceeds of the final decree entered in in this case on December 30, 1929, was to be paid to the Z. E. G. or any other German national. 3013

Mr. Rhodes further said that he remembered Mr. Abramson coming in to his office in reply to a number of letters which had been written by Mr. Rhodes to Arthur Garfield Hays, inquiring whether or not the Z. E. G. was going to appeal; that when Mr. Abramson arrived in Mr. Rhodes' office, he informed Mr. Rhodes that the Z. E. G. was not going to appeal and that he desired that the Government not appeal; that thereupon Mr. Rhodes requested that Mr. Abramson notify him in writing under the signature of Mr. Arthur Garfield Hays, the attorney of record for the Z. E. G., that the Z. E. G. was not going to appeal and that Mr. Abramson thereupon advised Mr. Rhodes that he was an associate of Mr. Hays and that if he would call in a stenographer to write a letter for him he would sign Mr. Hays' name to the same, which was done; and thereafter, on March 26, 1930, Mr. Rhodes transmitted his memorandum to the Solicitor General recommending that no appeal be taken. 3014

Mr. Rhodes further advised this deponent that at no time was any statement made by him which would serve as the basis for the deduction drawn by Mr. Abramson that he, Mr. Rhodes, knew that any part of the proceeds of the final decree of December 30, 1929, was to be paid to the Z. E. G., and that he never knew that any part of this money was paid to the Z. E. G. until April 2, 1938, when he was so advised by Mr. F. J. McNamara. 3015

Mr. Rhodes further stated, with reference to the statement in the Memorandum of Mr. H. H. Martin, set forth on page 16 of the affidavit of this deponent attached to the moving papers, to the effect that "Mr. Barnes then said that the Department of Justice through Mr. Rhodes was fully advised as to the possible settlement between Z. E. G. and the liability of the Siecken Estate under the Indemnity Agreement," that such statement by

3016 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Mr. Barnes was not correct; that he has no recollection of discussing a compromise settlement between the German Government or the Z. E. G. and the plaintiffs, either with Mr. Barnes or Mr. Avery, in connection with the indemnity agreement, but has a distinct recollection of conferring with Mr. Barnes and Mr. Doyle in regard to a proposed stipulation as to certain material facts in the case.

Mr. Rhodes further stated that the copy of the Memo-
3017 randum of Thomas E. Rhodes, dated March 24, 1930, hereto annexed as Exhibit B and made a part hereof, is a correct copy; that he would have stated therein the facts in reference to any compromise between the plaintiffs Sorenson and Nielsen and the defendant Z. E. G., or with Theodor Wille, either under the so-called indemnity agreement or under any other agreement, if he had known of such compromise, because under such circumstances the Trading with the Enemy Act, as amended, would have precluded a return directly or indirectly to the German Government, or to the Z. E. G., as a German Government corporation, or to the firm of Theodor Wille, or to any other person, as a debt claim-
3018 ant, who was an enemy within the meaning of that term as used in said Act.

Mr. Rhodes further stated that Clara Sielcken Schwarz, widow of Hermann Sielcken, was present at the trial of this case; that, if it had been disclosed to him that Hermann Sielcken was an enemy within the meaning of the Trading with the Enemy Act, and was the owner of all the capital assets of the firm, and that the said assets passed to the executor of Hermann Sielcken upon the death of said Sielcken, he would have raised the question of the jurisdiction of this Court at the trial; that his position as attorney in this case was taken in reliance upon the fact that Mr. Hays, as counsel for the Z. E. G., was assuming the burden of the defense, and for that reason, in addition to the pressure of other litigation demanding his attention in Washington, he, Mr. Rhodes, did not give the case the attention that he otherwise would have given to it.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3019

Mr. Rhodes further stated that since the pending motion was filed, Mr. Selden Bacon came to Washington this summer to see him about this case and that he talked to Mr. Bacon and Mr. Richard S. Doyle and that he had advised them the same as he had advised this deponent, that he knew nothing about any of the proceeds of the final decree of December 30, 1929, in this case being paid to the Z. E. G. until he was so advised by Mr. F. J. McNamara this year and that he was not going to file an affidavit for either party. 3020

Mr. Rhodes has advised the deponent that he does not desire to make an affidavit in this case, stating that he is engaged in the private practice of law and is very busy; that he would not feel justified in making a comprehensive affidavit on the case without first reading all of the pertinent records and files which he does not have the time to do, and which, if he did read them, would require a very considerable time.

Mr. Rhodes has read this affidavit and has informed this deponent that the facts stated therein regarding his alleged knowledge of this case are true to the best of his knowledge and recollection.

This deponent desires to call attention also to a letter received by the Department of Justice from Mr. H. H. Martin, counsel of the Mixed Claims Commission, United States and Germany, under date of September 21, 1938, a copy of which letter is hereto attached, marked Exhibit C, and made a part hereof. This letter calls attention to the inaccuracy of certain statements made by Mr. Avery in his affidavit executed on August 11, 1938, and filed in these proceedings to vacate decree herein. 3021

FRANK C. STERCK.

Subscribed and sworn to before me
this 10th day of October, 1938.
Isidore M. Fuchs,
Notary Public.
Bronx Co. Clk's No. 153; Reg. No. 152F40.
N. Y. Co. Clk's No. 812; Reg. No. 0 F 448.
Commission Expires March 30, 1940.
(Seal.)

3022 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

Index.

Exhibits

A Letter dated December 7, 1928, to Mr. Rhodes from Mr. Richard S. Doyle.

B Memorandum for the Solicitor General, dated March 24, 1930, signed by Thomas E. Rhodes.

C Letter dated September 21, 1938, to F. J. McNamara, Esquire, from H. H. Martin, Counsel of the Mixed Claims Commission.

3023

3024

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3025

Exhibit A.

Letter dated December 7, 1928, to Mr. Rhodes from Mr. Richard S. Doyle.

9-17-9-9394
May 24, 1929

HOPKINS, STARR, HOPKINS & HAMEL

LAWYERS

3026

Southern Building

WASHINGTON, D. C.

Telephone Franklin 630

December 7, 1928.

Re: JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,

District Court of the United States for the Southern District of New York.

3027

Equity No. 44-28.

Thomas E. Rhodes, Esq.,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

Sir:

In accordance with your suggestion made at a conference with you, Mr. Alger and myself, on November 28th, I write you this letter of explanation to accompany

3028 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

the proposed stipulation and documents in this action.

It is, as we told you, our intention to press this case for early trial. The documents as to which stipulation is sought are all part of the record of the Mixed Claims Commission, and a brief reference to the Mixed Claims Commission proceeding in which substantially a similar issue is presented is pertinent. As you will observe by the Memorial, List No. 636, Docket No. 8305, copy of which with its exhibits accompanies this letter, the
3029 present plaintiffs therein make certain allegations of fact in certain numbered paragraphs. The German Government has made a reply recently filed to this Memorial, copy of which with its exhibits, also accompanies this letter. You will note that the allegations of fact contained in our Memorial are not disputed as to any matters or as to any documents concerning which stipulation is sought. In the answer of Germany, it questions whether Mr. Sielcken was in fact a resident of the United States temporarily residing in Germany, or whether Mrs. Sielcken was such, and as to the effect of his New York will to Columbia Knickerbocker Trust
3030 Company as Executor. These matters of dispute relate only to the allegations of paragraphs (1) to (4) of our Memorial, and as to these matters stipulation is not sought.

Now, considering the subsequent paragraphs, you will note by Germany's answer that the allegations of items (8) to (17) of the Memorial are not disputed, except that Germany states (see page 6 of its answer) that we omit to make mention of a certain arbitration and interlocutory decision on which a compromise was concluded, which Germany claims is binding upon us and which compromise they claim was by implication ratified by Messrs. Sorenson and Nielsen, at a later date (page 12). Omitting the consideration of this compromise matter for the moment, Germany's answer does not dispute the authenticity of any of the documents attached to our Memorial, or the correctness of the statement of facts therein. As Zentral-Einkaufsgesellschaft

3031

was but a branch of the German Imperial Government, there is no substantial difference between Zentral-Einkaufsgesellschaft and German as to these issues. These documents, therefore, covered by the stipulation are not matters of dispute and are concededly correct, and it would be a useless waste of your time and the time of the court to require formal proof concerning them.

So far as the allegations of paragraphs (15) and (16) of the Memorial are concerned, the figures given by 3032
which the net amount of $380,761.54 is reached, are likewise covered by affidavit and by specific figures of our accountant, Mr. Martin, taken from the books of Crossman & Sielcken. These also are not disputed, but if you feel that it is desirable to have these figures checked by someone on your behalf, the books are here with the Mixed Claims Commission and available for that purpose.

So far as the contract which forms the basis of our suit is concerned, this is, as stated before, not subject to dispute. It will not be questioned that the letter referred to as "A" in the stipulation is the letter on 3033
which these goods were shipped. Dr. Kiesselbach himself was one of the arbitrators in the arbitration to which the German Government refers in its answer and the statement of fact in the arbitration report shows this letter to be the contract offering made to Sielcken by Reichseinkauf and continued by Zentral-Einkaufsgesellschaft, its successor, subject to a modification also not in dispute and which is covered by proposed letter "B" of the stipulation.

Now a word as to the alleged arbitration and compromise:

We are furnishing you herewith, for your information, copy of opinion rendered by Dr. Neumann, a Judge of the Commercial Court of the Reich. Negotiations for a settlement of this matter were instituted at the suggestion of certain officials of the German Foreign Office. Mr. Avery went to Berlin and it was suggested

3034 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

that the opinion of the Minister of Justice be taken on this subject. Instead, by agreement, the question was referred to Dr. Neumann, a distinguished Judge of that court, for an opinion. This was done. Dr. Neumann has held that the alleged compromise relied on in the answer of German was void, owing to the personal interest of two of the executors in the subject-matter of the arbitration. Other reasons are also afforded for avoiding the compromise as an entirety. The
3035 alleged compromise being void any subsequent agreement of the executors based thereon falls with it. This, however, is not as we see it a pertinent matter in the Federal action, Zentral-Einkaufsgesellschaft not having appeared or made any answer therein.

As we view the present action, it presents mainly a question of law upon an indisputable state of facts. It would be a waste of the court's time, as well as your time and ours, to require the production of evidence on facts which are not disputed. It is highly important that the issues arising in this suit be determined at the earliest possible moment, and we desire to proceed with all possible speed to an adjudication of this court upon
3036 these issues.

If there are any matters connected with the foregoing or with the documents submitted which can be simplified to you by a personal conference, I shall await your convenience for a meeting for that purpose.

I remain,

Very truly yours,

R. S. DOYLE.

RSD:G

(Stamped): Department of Justice May , 1929 P. M. Mail and Files Division C Farnum-Rhodes.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3037

Exhibit B.

Memorandum for the Solicitor General, dated March 24, 1930, signed by Thomas E. Rhodes.

Address Reply to
"The Attorney General"
and Refer to
Initials and Number
9-17-9-9394
No Appeal
C. E. H. Jr.
March 29, 1930

I concur.
J. FRANK STALEY

3038

DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

March 24, 1930.

MEMORANDUM FOR THE SOLICITOR GENERAL.

(Through Mr. Staley)

In Re: Sorenson & Nielsen v. Sutherland, et al.

3039

Office of
Received
Mar 26 1930
Solicitor General

(Stamped): Apr 1 1930

Time for Appeal Expires on April 2, 1930.

The question presented by this memorandum is whether or not an appeal should be taken by the Alien Property Custodian and the Treasurer of the United States from the final decree entered in favor of the plaintiffs in the above entitled case on January 2, 1930.

This suit was instituted in the United States District Court for the Southern District of New York by John S. Sorenson and Thorleif S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, against the Alien Property Custodian and the Treasurer of the

3040 *Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto*

United States, to which suit the Zentral Einkaufsgesellschaft, m. b. H. was made a party defendant, to recover a debt of $380,761.54, with interest thereon since 1915, alleged to be due and owing to the plaintiffs by said Zentral Einkaufsgesellschaft. The record clearly establishes the fact that the Zentral Einkaufsgesellschaft (formerly called the Reichseinkauf) was the purchasing agent of the Imperial German Government during the World War and was an agency and instrumentality of the German Govern-
3041 ment. The evidence also shows that the Zentral Einkaufsgesellschaft had several hundred thousand dollars in the United States at the time of the enactment of the Trading with the Enemy Act on October 6, 1917, and said money was duly seized by the Alien Property Custodian as the property of said Zentral Einkaufsgesellschaft and deposited in the Treasury of the United States in the name of said Zentral Einkaufsgesellschaft. There is now held in the Treasury of the United States in the name of said Zentral Einkaufsgesellschaft more than sufficient money to satisfy the decree in favor of the plaintiffs in the above entitled case.

3042 It appears from the record, and the Court in its opinion found as a fact, that Crossman & Sielcken were employed in September, 1914, by the Reichenkauf (later called the Zentral Einkaufsgesellschaft) to purchase certain food supplies in the United States for the German Government and that Crossman & Sielcken, who had their office and place of business in New York City, purchased several shipments of food supplies which were duly shipped to Germany in 1915. Several of the shipments were captured by the British and condemned in the British Prize Courts as prizes of war. As to the consignments which were captured by the British the Zentral Einkaufsgesellschaft refused to pay Crossman & Sielcken therefor, claiming that title did not pass and no liability ensued on the part of said Zentral Einkaufsgesellschaft until the goods should be delivered at a Baltic seaport. Crossman & Sielcken and their successors, Sorenson & Nielsen, the plaintiffs herein, have always contended that the title passed when the goods were placed on board the vessel

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3043

in New York and that the liability of the consignee arose when the goods were placed on board the vessels in New York.

The enemy, Zentral Einkaufsgesellschaft, which was made a party defendant along with the Alien Property Custodian and the Treasurer of the United States employed counsel (Mr. Arthur Garfield Hays of New York) who vigorously contested the case on behalf of said defendant. I represented the Alien Property Custodian and the Treasurer of the United States and Mr. Hays and I 3044
cooperated fully and presented every pertinent point we could discover on behalf of the defendants. The case was heard by Judge Caffey for two days and at the conclusion of the hearing he delivered an oral opinion which was taken down in shorthand and which will be found at the end of the Transcript of Record attached hereto in which he decided in favor of the plaintiffs.

I have gone over this Record very carefully and am convinced that the decision of the Court is correct; that Crossman & Sielcken, of New York, were undoubtedly employed by the Zentral Einkaufsgesellschaft, the purchasing agency of the German Government, prior to the entrance of the United States into the World War to 3045
purchase supplies for the German Government; that Crossman & Sielcken, with their own partnership funds, purchased said supplies, and that they have never been reimbursed by anybody; that the title to the goods passed to the consignee, the Zentral Einkaufsgesellschaft, when they were placed on board the vessels in New York, and that the Zentral Einkaufsgesellschaft was indebted, prior to October 6, 1917, the date of the enactment of the Trading with the Enemy Act, to the plaintiffs herein in the amount of $380,761.54. The plaintiffs being citizens of the United States and non-enemies within the meaning of the Trading with the Enemy Act and their debt having arisen prior to October 6, 1917, are clearly entitled to recover the same out of the funds of the debtor held by the Custodian in the Treasury of the United States pursuant to the provisions of Section 9 (a) of the Trading with the Enemy Act.

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There is attached hereto a letter from Mr. Arthur Garfield Hays, dated March 24, 1930, in which he states that the Zentral Einkaufsgesellschaft will not take an appeal from the final decree entered in this case.

Inasmuch as the decision in this case is undoubtedly correct and as the enemy defendant has decided to take no appeal, there is no reason for the Alien Property Custodian and the Treasurer to take an appeal.

I, therefore, recommend that no appeal be authorized.

3047

Respectfully submitted,

THOMAS E. RHODES,
Special Assistant to The Attorney General.

Enclosures

Bill of Complaint,
Motion to Dismiss and Answer of APC and Treas.,
Answer of the Defendant, Zentral Einkaufsgesellschaft, m. b. H.,
Stipulation of Plaintiffs and U. S. Attorney,
Stipulation of Defendant, Zentral Einkaufsgesellschaft,
3048 Supplemental Stipulation of Plaintiffs, and Zentral Einkaufsgesellschaft,
Transcript of Record,
Final Decree,
Letter of Mr. Arthur Garfield Hays, dated March 24, 1930.

Supplementary Affidavit of Frank C. Sterck, Verified October 10, 1938, and Exhibits Thereto 3049

Exhibit C.

Letter dated September 21, 1938, to F. J. McNamara, Esquire, from H. H. Martin, Counsel of the Mixed Claims Commission.

MIXED CLAIMS COMMISSION

United States and Germany

3050

UNITED STATES AGENCY

Department of State

Washington

September 21, 1938.

Department of Justice
Alien Property Bureau
Received Sep 22 1938
Noted ..... Date .....
Ans'd ..... Date 3051

F. J. McNamara, Esquire,
Department of Justice,
Washington, D. C.

Dear Mr. McNamara:

Reference is made to our conversation on the 14th instant in relation to the Crossman & Sielcken matter, at which time you gave me a copy of Mr. Avery's affidavit of August 11, 1938, as filed in the proceedings in the United States District Court, Southern District of New York, equity No. 44-28.

I have been reading over rather carefully Mr. Avery's affidavit. The statement contained in the first paragraph at page 43 in relation to Mr. Bonynge's being present at a conference had in Washington on March 17, 1930, in relation to the Crossman & Sielcken claims then pending

before the Commission is inaccurate. Mr. Bonynge was not in Washington at the time and did not attend the conference. This is evidenced not only by my memorandum of March 17, 1930, covering the conference, but also by my letter of March 18, 1930, to Mr. Bonynge in New York sending him a copy of the memorandum.

The statement in the paragraph beginning at the bottom of page 43 purporting to quote a statement said to have been made by me to Mr. Avery is likewise inaccu-
3053 rate. I have no recollection of making a statement of this specific character nor am I able to find among the Agency records any record of such a statement. I may well have conveyed to Mr. Avery a message from the German Agent that he, the German Agent, would like to talk with Mr. Avery in relation to the settlement and have suggested to Mr. Avery that so far as the Agency was concerned there was no objection whatsoever to his conferring further with the German Agent in relation to working out details of the settlement. I am certain that I did not tell Mr. Avery that it was "unusual for the German Agent to have personal conferences with counsel for claimants." Such procedure was not "unusual,"
3054 particularly where such conference was requested by the German Agent.

Sincerely yours,

H. H. MARTIN,
Counsel.

Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938 and Exhibit. 3055

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

3056

Equity No. 44-28.

City of Washington,
District of Columbia.

Frank C. Sterck, being duly sworn, deposes and says: 3057

That he is an Attorney in the United States Department of Justice.

That heretofore, namely, on the 10th day of October, 1938, deponent executed a supplementary affidavit with reference to certain statements made to him by Mr. Thomas E. Rhodes, former Special Assistant to the Attorney-General, who represented the Alien Property Custodian at the trial of this case in this Court in 1929;

That said affidavit has been served upon opposing counsel and filed herein on behalf of the Government at the argument of the motion to vacate the decree herein on October 11, 1938;

That on October 19th, 1938, the deponent received a letter dated October 18, 1938, from Thomas E. Rhodes, attorney at law, Southern Building, Washington, D. C., the original of which is on file in the Department of Jus-

3058 *Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit*

tice, Washington, D. C., a photostatic copy of which is hereto annexed and made a part hereof.

FRANK C. STERCK.

Sworn to before me this
25th day of October, 1938.
Sophie D. Freeman,
Notary Public.
My Commission expires October 15, 1940.
3059 (Notarial Seal)
(Clerk's Certificate No. 98064.)

Exhibit.

Letter from Thomas E. Rhodes of October 18, 1938.

(Department of Justice
Alien Property Bureau
Received Oct. 19, 1938
Noted ..... Date .....
3060 Ans. ..... Date .....)

9-17-9-9394

Tel. National 2263

(Department of Justice
Oct. 19, 1938 A. M.
Division of Records
Claims Div.)

THOMAS E. RHODES
Attorney at Law
Southern Building
Washington, D. C.

October 18, 1938.

Frank C. Sterck, Esq.,
3rd Floor,
Department of Justice
Ninth Street and Pennsylvania Avenue, N. W.
Washington, D. C.

Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit 3061

Dear Mr. Sterck

On October 13, 1938, you and Mr. F. J. McNamara informed me in your office that in an argument before Judge Goddard of the United States District Court for the Southern District of New York on October 11, 1938, Mr. Selden Bacon stated that he had talked with me on the long distance telephone that morning and that I had stated that your affidavit filed on October 11, 1938, in the case of Sorenson and Nielsen vs. Sutherland, et al., Equity No. 44-28, "was filled with lies." I beg to 3062
advise you that I never made any such statement to Mr. Selden Bacon or any one else. I did not talk with Mr. Selden Bacon on October 11, 1938, by telephone or otherwise. I have no recollection of ever having talked to him on the telephone in my life. I know I have not seen or talked with him since on or about July 30, 1938, when I was with him for a short while at lunch in company with Mr. Richard S. Doyle at the University Club in Washington.

My secretary advises me that late in the afternoon of October 10, 1938, a New York telephone operator called my office and asked for me and my secretary advised her 3063
that I was not in the office and said operator asked my secretary where I could be located, and my secretary gave her my home telephone number. I did not go home from my office that evening but went out to dinner and spent the evening in company with a young lady and did not return to my place of abode until after midnight. Whether Mr. Bacon tried to contact me at my home that night or not I have not been able to ascertain.

The next morning Mr. Richard S. Doyle of Washington, D. C., called my office and asked for me, but I was not in as I went to the Court House that morning. He then asked my secretary if I had received a telephone call from Mr. Bacon the day before and she told him that I was not in when someone from New York tried to get me. Later in the morning Mr. Doyle called again and I still had not returned to the office. When I did return late on the morning of October 11th, I called Mr.

3064 *Second Supplementary Affidavit of Frank C. Sterck, Verified October 25, 1938, and Exhibit*

Doyle and he told me that Mr. Bacon had been trying to get in touch with me and wanted to talk to me about your affidavit, but he (Mr. Doyle), did not seem to know just what Mr. Bacon wanted to talk about as he (Mr. Doyle) had not seen the affidavit.

I thereupon told Mr. Doyle that I had seen a draft of your affidavit before it was filed and that I had suggested certain corrections and changes therein and that thereafter I had seen a copy of the final draft of your
3065 affidavit after said corrections and changes had been made and that to the best of my knowledge, information and belief the statements made in your affidavit were true, and I still think that your said affidavit is a fair statement of the situation according to the best of my knowledge, information and belief.

I was a special assistant to the Attorney-General of the United States from January 1, 1922, until June 24, 1933, engaged upon duty in the Alien Property Division of the Department of Justice and I represented the Alien Property Custodian and the Treasurer of the United States in the trial of the aforesaid case in the District Court of the United States for the Southern District of
3066 New York in December, 1929, and I prepared the final decree in that case. My recollection is that Mr. Dean Hill Stanley, who preceded me, in charge of Alien Property cases in the Department of Justice, prepared the answer of the Alien Property Custodian and Treasurer of the United States to the amended bill of complaint.

It is my recollection that the primary question involved in that case was whether or not the title to certain cargoes passed from the plaintiffs to the Zentral Einkaufs Gesellschaft at the time the goods were placed on board ship in the New York Harbor or at the time of their delivery at a Baltic seaport. Mr. Arthur Garfield Hays entered an appearance for the Zentral Einkaufs Gesellschaft and filed an answer on behalf of said defendant. He conferred with me a number of times before the trial and I always thought that he defended the case in good faith, and vigorously, too, and did

everything he could to defeat the plaintiffs. At no time during the progress of that case and before the final payment of the proceeds of the final decree of December 30, 1929, did I know of any plan, agreement or understanding by which any part of the proceeds of said decree would be paid to any alien enemy. If I had known of any such plan, I would most certainly have brought the matter to the attention of my superior officers in the Department of Justice.

From about 1926 until the time I left the Department 3068
of Justice I passed upon many thousands of claims and handled hundreds of cases in the Courts and in every instance I endeavored to see that all of the rights of the United States were protected, and in the handling of so many thousands of matters there may have been instances where I erred in judgment but I think you will find that in almost every instance where any error was made it was made in favor of the government.

I have no interest in this case and I have not filed an affidavit on behalf of either party for the reason as stated by you in your affidavit that I have not had time to study the entire record sufficiently to feel justified in making a comprehensive affidavit on the entire case. 3069

At the time I had this case under consideration I had no knowledge of many facts that are now asserted by the Department of Justice, but I am frank to say that if I had known about them I would most certainly have brought them to the attention of my superior officers in the Department of Justice while the case was pending and before the final disposition thereof.

In view of the aforesaid statement attributed to Mr. Selden Bacon, I feel that in fairness and justice to you I should send you this letter.

With kindest regards, I am,

Very truly yours,

THOMAS E. RHODES.

3070 **REBUTTING AFFIDAVITS FOR IRVING TRUST CO., AS EXECUTOR.**

Affidavit of George E. Warren, Verified September 23, 1938.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of
3071 the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H.,
Defendants.

Equity No. 44-28.

In Proceedings to Vacate Final Decree of December 30, 1929.

3072 State of New York,
County of New York, ss:
Southern District of New York,

George E. Warren, being duly sworn, says:

That he has examined Exhibit 5 of the replying affidavit of Mr. Sterck herein, verified the 15th day of September, 1938.

As to the first paper in that Exhibit 5 (which has no other number but is described as "Designation of Depositary, dated December 31, 1917") deponent has no recollection of ever having seen any such paper or of any such designation having been made. The paper on its face fails to show that it was ever delivered or that it was ever accepted.

As to the designation of depositary No. 5-a of July 30, 1918, deponent believes that that document, which

Affidavit of George E. Warren, Verified September 23, 1938 3073

includes four sheets, was delivered to the Trust Company but that the same was not a designation of the Columbia Trust Company as depositary of any particular funds but only a general appointment, qualifying it to serve if it should be appointed depositary of any particular fund by the Alien Property Custodian, and deponent believes that the bond, of which a copy is set forth as Exhibit 5-b was given, but this again does not refer to any particular funds but was simply a general bond to be responsible for any funds which should be deposited with the Trust Company as such depositary. 3074

As to the document Exhibit 5-c of that affidavit of Mr. Sterck's, deponent never received any such document and believes that none ever came to the Trust Company; and deponent calls attention to the fact that the paper, on its face, is not completely executed.

As to the document, Exhibit 5-d of that affidavit, which purports to be a designation of the Columbia Trust Company as depositary of the property of Hermann Sielcken, deceased, deponent never saw any such paper, and if it had come to his attention in 1918 deponent would promptly have called attention to the fact that the Custodian had no power to designate the Columbia Trust Company as depositary of that estate since the title to the property had vested in the executor, which had been previously acknowledged by the Alien Property Custodian. Deponent further calls attention to the fact that there is no affidavit or other proof showing that any such paper was sent to the Columbia Trust Company, and that the paper is marked on its face "Nixed." 3075

As to the document, Exhibit 5-e, of date October 19, 1918, deponent recalls that such a paper was delivered to the Trust Company, but was subsequently cancelled in April, 1921, as to the interest of Mrs. Sielcken and her property. The other legacies lapsed and the Trust Company never received anything as depositary under that instrument.

As to Exhibit 6 of that affidavit of Mr. Sterck's, deponent says that none of these papers was ever received

3076 *Affidavit of George E. Warren, Verified September 23, 1938*

by the Columbia Trust Company from the Alien Property Custodian's office, and deponent never had any knowledge thereof, and that there is no suggestion in the affidavit of Mr. Sterck that any of them ever was sent to the Trust Company.

GEORGE E. WARREN.

Subscribed and sworn to before me
this 23rd day of September, 1938.
William G. Phillips.

3077 William G. Phillips,
Notary Public,
Nassau Co., N. Y. No. 1021.
Certificate filed in N. Y. Co. No. 108.
N. Y. County Register's No. 0-P-63.
My Commission Expires March 30, 1940.

(Notarial Seal)

3078

Affidavit of Brainard Avery, Verified September 22, 1938. 3079

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL-EINKAUFS GESELLSCHAFT m. b. H., Defendants.	Equity No. 44-28. 3080
In Proceedings to Vacate Final Decree of December 30, 1929.	

State of New York,
County of New York, ss:
Southern District of New York,

Brainard Avery, being duly sworn, deposes and says: 3081

That he has read the replying affidavits of Mr. Frank C. Sterck and of Harold H. Martin.

Deponent further says that the letter, Exhibit 3, dated March 1, 1915, never came to deponent's attention in any way nor did deponent know anything about the same until perusing the said affidavit of Mr. Sterck verified the 15th day of September, 1938.

Deponent further says that the same is true of the documents embodied in Exhibit 5 of the said affidavit, and deponent has no recollection of ever having seen the originals of any of the papers constituting Exhibit 6 of that affidavit until the examination of Mr. Sterck's affidavit on September 21, 1938.

Deponent further says that all the contents of the letter from Mr. Martin to Mr. Bonynge of March 17, 1930, excerpts of which are put in as Exhibit E of Mr. Martin's

affidavit, were entirely unknown to this deponent until September 21, 1938; that the matter stated in the paragraph of those excerpts beginning "one of these book accounts" and ending "will not be very large" indicates to deponent that Mr. Martin had had some conference with Dr. von Lewinski, the German Agent, or some member of his staff, with regard to the claim of Wille after the conference of March 17, 1930, which was not communicated to this deponent; and the fact that Wille would be apt to make a claim for half of the commission of Crossman & Sielcken on the cargoes was not communi-
3083 cated by anyone to deponent at any time after 1928.

It is true that if no settlement was arrived at of the claim under the Wille Memorial, all features of the accounts would have had to be tried; but no such claim as Mr. Martin describes in that letter to Mr. Bonynge was asserted in the Wille answer to that Memorial (Exhibit C of original affidavit of Selden Bacon). And the claim of Wille that all matters involved in the accounts (other than the claim on account of the 8,000,000 Marks of bonds) balanced each other, was made the basis of settlement of the Wille Memorial, as is shown in the Minutes of Martin of the meetings of January 9th, 1930, and March 17th, 1930.

3084 The only statement that was made to deponent after 1929 as to the nature of any claim that might be asserted by Wille, was that made by Mr. Hays to deponent, that Wille was threatening to assert some kind of a substantial claim in Germany against the property of the Sielcken estate in Germany, the nature of which Mr. Hays said he did not know.

BRAINARD AVERY.

Subscribed and sworn to before me
this 22nd day of September, 1938.
James S. Ogsbury, Jr.,
Notary Public,
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal)

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto. 3085

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

3086 Equity No. 44-28.

State of New York,
County of New York, ss:
Southern District of New York,

Selden Bacon, being duly sworn, deposes and says: 3087

That he is one of the solicitors for the Irving Trust Company as Executor of Hermann Sielcken, deceased, in this proceeding to vacate decree.

Deponent further says that he has examined with care the affidavits of Mr. Sterck and Mr. Martin served in reply and is familiar with the contents thereof.

Deponent calls attention to the curious misapprehension contained in the replying affidavit of Mr. Sterck as to the affidavits submitted in answer, particularly as to the affidavit by Mr. Avery.

Mr. Sterck asserts that the affidavit of Mr. Avery attempts to establish.

1) that the Wille claim to participate in the Z. E. G. recovery was settled and discharged before 1927 and that the $50,000 payment to Wille was made on unknown grounds:

3088 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

2) that suit in the names of Sorenson and Nielsen was proper; and

3) that payment to the Zentral Einkaufs-Gesellschaft was in compromise of the indemnity agreement.

Mr. Sterck seems to overlook the fact that the affidavit of Mr. Avery goes very much further than this and shows not only that all the facts in the case were made known to Mr. H. H. Martin and to Mr. Rhodes, but that nothing was concealed from them, and these statements
3089 are fully supported by the affidavits of Mr. Doyle and Mr. Abramson and by numerous contemporaneous documents, annexed as Exhibits; and now, in turn, by the replying affidavit of Mr. Martin, and Mr. Avery's affidavit contains, in addition, a complete rebuttal of all the innuendoes of fraud on the part of the claimants and the executor, in securing the decree.

Mr. Sterck also asserts that it is admitted that Wille had a half interest in the cargoes and in the claim against Z. E. G. The executor does not admit that Wille ever owned a half interest in the cargoes or in the claim against Z. E. G.

3090 The documents in evidence establish conclusively that the firm of Theodor Wille was not a party to the agreement between Crossman & Sielcken and the Reichseinkauf-Gesellschaft, later assumed by the Zentral Einkaufs-Gesellschaft. The only statement of Wille's interest in any of the contemporaneous documents that we have been able to find, consists of six words in the letter from Hermann Sielcken to John S. Sorenson, of September 22, 1914 (Exhibit E of Sterck's original affidavit), in which Sielcken says: "Wille share the risk with us." How they were going to share it does not affirmatively appear; but the same letter is certainly clear that there was no idea that Wille was to have any interest in the cargoes themselves; and, apparently, it was at most an independent indemnity agreement that Sielcken concluded with Wille, the exact terms of which he did not disclose. But apparently it was an independent agreement that Crossman & Sielcken would pay Wille one-half of any

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

profits they made, and would be paid by Wille half of any losses that might be sustained by Crossman & Sielcken in the transacton. 3091

It is true that in the Memorial of 1922 it was asserted that Wille had a half interest in those cargoes, but no evidence was introduced there in support of that allegation; and that Memorial was withdrawn in February, 1924.

There was a statement, at one time by Mr. Sorenson, that Wille had such an interest, but Sorenson testified in 1934 in Matter of Sielcken that he had never seen Sielcken since Sielcken's sailing to Europe in early 1914, months prior to the inception of the cargoes matter; and Sorenson seems to have been in that instance simply stating an inference he had drawn, which inference he later withdrew on fuller knowledge of the facts. 3092

The statements of Mr. Sterck as to the books of Crossman & Sielcken (which are in the possession of deponent and have been for several years last past) are quite incorrect. The transaction was not originally entered as on "Joint Account." True, the caption of the account now so reads, but in the Surrogate's Court proceeding in "Matter of Sielcken," it was conclusively shown by the testimony of Mr. Sorenson, that the words "Joint Account" were written in long afterwards, in 1917, on the ledger. 3093

Excerpts from Mr. Sorenson's testimony in Matter of Sielcken in the Surrogate's Court, covering his entire testimony on the subject, are hereto annexed, marked Exhibit C, and hereby made a part of this affidavit. Deponent conducted most of such examination of said Sorenson, and believes what Sorenson then testified to be true.

Deponent annexes hereto photostatic copies of the Copenhagen cargoes account on the ledgers of Crossman & Sielcken, Exhibit A hereof being a photostatic copy of that account on page 710 of Brazilian Ledger J, which was in use up to December 31st, 1916, and Exhibit B being a photostatic copy of the same account on page 916 of

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Brazilian Ledger K, which ledger was in use from and after January 1, 1917.

There is no evidence even tending to show that Wille had a half interest in the cargoes, or any direct interest in the claim against the Zentral Einkaufs-Gesellschaft, other than the six words in the letter of Sielcken above quoted, which say only that Wille shares the risk, except for these statements of conclusions of Sorenson, who, admittedly, had no personal knowledge of the matter, and had never seen the agreement with the Reichseinkauf-
3095 Gesellschaft (which was succeeded by the Zentral Einkaufs-Gesellschaft), and which conclusions Sorenson later withdrew.

If there were no settlement and the Wille Memorial had to be tried on its merits including all the items in the various Wille accounts kept by Crossman & Sielcken, it was obvious that the charges against Wille (made in 1917) on account of the Copenhagen cargoes would be involved in the accounting, and if they were sustained a rival claim by Wille for half of the profits would be forthcoming. Mr. Martin's letter to Mr. Bonynge of March 17, 1930, of which excerpts are annexed to Mr.
3096 Martin's affidavit as Exhibit E apparently refers to that dispute, and not to any claim made by Wille in 1930.

Mr. Sterck also asserts that the executor reversed its position in 1924 about Mrs. Sielcken's settlement with Wille in 1922. In 1922, when that settlement was first brought to the attention of the Trust Company, there were outstanding claims in litigation against the Executor, of the Woolson Spice Company for something over $1,125,000, and of Mrs. Blackwell for half of the net estate. With those heavy claims pending against the estate, it was quite impossible for the executor to approve or confirm a settlement made by Mrs. Sielcken, that might prejudice those other parties in interest in the estate. The executor had to guard the interests of these creditors.

By the end of 1923, both these claims of the Woolson Spice Company and of Mrs. Blackwell had been finally

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

3097

settled and disposed of and Mrs. Sielcken became then the only person interested in the estate. Owing to that change of circumstance, it was entirely proper for the executor to adopt a settlement that had been made in 1922 by Mrs. Sielcken Schwarz since she had become the only person beneficially interested in the estate. It was not a change of mind on the part of the executor, but a change of circumstances which warranted the executor's adopting the settlement made by Mrs. Sielcken and canceling the claim against Wille, withdrawing the 1922 Memorial with regard to that claim, which had been filed with the express understanding with Mrs. Sielcken Schwarz that once the outstanding claims of the alleged creditors of the estate and alleged right to participation therein, were finally disposed of, the claim should be withdrawn, as it was after they were so disposed of. A copy of the letter declaring this arrangement before the 1922 Memorial was filed, is embodied in the affidavit of Mr. Leonard B. Smith on page three thereof.

3098

Mr. Sterck also quotes at great length from a brief prepared and filed by this deponent before the Surrogate for New York County in Matter of Sielcken in late 1935. Mr. Sterck apparently seeks to intimate that all the facts asserted in that brief were known to the plaintiffs in this suit and to the executor at the time that this suit was brought and prior to the entry of decree herein on December 30, 1929.

3099

In point of fact, the facts mentioned in that brief on which Mr. Sterck relies first came to the attention of the executor and of this deponent, as its attorney in the Sielcken matter, only in 1934, over four years after the entry of the decree herein and nearly four years after payment of the judgment herein rendered; and they were then discovered by deponent through examination of the papers in the files of the Mixed Claims Commission in connection with the Memorial against Z. E. G., with which, of course, Mr. Martin was thoroughly familiar, and copies of which papers were sent to Mr. Rhodes in December, 1928, by Mr. Doyle. These papers first came

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to the attention of Mr. Avery and constructively to that of the two plaintiffs and the executor in 1928, and were filed with the Mixed Claims Commission more than a year before this suit was tried. After examining these files of the Mixed Claims Commission, deponent, in 1934, made search in Europe through foreign attorneys for the papers referred to in the Zentral Einkaufs-Gesellschaft's Exhibits filed with its answer to the Memorial before the Mixed Claims Commission, and finally succeeded in locating the papers in the proceedings begun by Mr. Sielcken
3101 in 1914 for renaturalization as a German, in the town of Rastatt, in Baden, Germany, and after considerable difficulty secured certified photographic copies thereof in 1935.

There were apparently but two places in Germany where such papers could have been filed, one in or near Hamburg, where Mr. Sielcken was born, the second at or near Baden-Baden, where Mr. Sielcken had his great place "Mariahalden" and was, in 1914, at least temporarily, resident.

Deponent first learned that there were no such papers in the Hamburg district, and then by search found that
3102 those papers would originally in due course have been filed in Baden-Baden, but that all the records of that court for Naturalization had been removed, after 1914, to Restatt, in Baden. Deponent traced out and found those papers and secured copies thereof, starting in 1934 with no more information on the subject than was already in the hands of both Mr. Martin and Mr. Rhodes in 1928.

It was, of course, known to all the parties and to all the counsel in this suit, both at the time of the trial and long before, that Sielcken had been staying in Germany, generally in Baden-Baden, at all times from 1914 till his death on October 8th, 1917. Those facts were fully brought out at the trial of the case and discussed by counsel and the court. Whatever bearing they had on any question of jurisdiction was thus determined by the Court in rendering its decree, and that determination was conclusive, except only on appeal therefrom.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3103

At page 27 of Mr. Sterck's affidavit, he has taken upon himself to question deponent's statement that only since the filing of the present motion has deponent been able to inquire into the details of the presentation of the present suit, and to support his suggestion calls attention to what he calls "the surprising familiarity of Mr. Bacon with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of the firm of Crossman & Sielcken, and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken." 3104

Deponent's familiarity with the facts relating to the status of John S. Sorenson and Thorleif S. B. Nielsen as surviving partners of the firm of Crossman & Sielcken and their standing to maintain a suit as parties plaintiff for the purpose of recovering assets of the firm of Crossman & Sielcken grew out of the action brought by The Chase National Bank of the City of New York as Ancillary Executor of Thorleif S. B. Nielsen, deceased, against John S. Sorenson, the Irving Trust Company as Executor, Mrs. Clara Sielcken-Schwarz, and others, which was tried at great length in 1932 before Mr. Henry F. Wolff as Referee of the Supreme Court to hear and 3105 determine the cause. In that action, deponent acted as Trial Counsel for the Irving Trust Company as such Executor and the status of Sorenson and Nielsen as surviving partners of the firm of Crossman & Sielcken and their standing as such was directly in issue and tried at length, and that whole question investigated; so that there should be nothing very surprising in deponent's familiarity with all the facts bearing on that important issue in that case which deponent had tried and briefed in that case in 1931 to 1933; the defendant Sorenson having counterclaimed in that action, asserting that he, as sole surviving partner, was entitled to the possession and administration of all the sums recovered in this suit and under the award against Germany under the Wille Memorial of 1927. Familiarity with those facts did not involve any but the most general information

3106 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

of the proceedings in this case, or in regard to the compromise agreement of 1930, under which this judgment was paid, and the award made against Wille.

Deponent repeats that, from 1932 on, until 1936, Mr. Avery was directly opposed to deponent in proceedings instituted by Mrs. Sielcken Schwarz to vacate the decrees of the Surrogate of 1921, 1922 and 1925, approving three intermediate accounts of this executor of this estate, and during the same period both Mr. Alger and Mr.
3107 Avery were actively representing Mrs. Sielcken Schwarz in a suit brought by her in Ohio against the Woolson Spice Company and the Irving Trust Company as executor of Hermann Sielcken, deceased, and a number of other individuals in Ohio, in which Mrs. Schwarz was attempting to recover very large amounts, apparently in excess of $2,000,000, charging a negligent and collusive sale by the Executor of a great block of valuable stock, to the prejudice of the estate. Very naturally, under those circumstances, deponent was not in a position to make inquiries of these opposed attorneys into the conduct of this suit or the details of the compromise that had been entered into in 1930, eighteen months before
3108 deponent had any connection whatever with the Sielcken estate; and which were not involved in themselves in any of the various litigations so instituted against the executor by Mrs. Sielcken Schwarz, except for a claim asserted by her that the executor had been negligent in not filing the 1927 Memorials earlier, which claims were met by showing that all information with regard to there being any claim against Zentral Einkaufs-Gesellschaft, had at all times after Sielcken's death been in the possession of Mrs. Sielcken in Germany, and had never been disclosed in any way either by her or by anyone else to the executor, until May, 1927, and then only in a very indefinite way; while the claim against Wille, predicated on the bonds alleged to have been held by Wille, was a claim which, as far as the American Executor knew, had nothing to do with the firm of Crossman & Sielcken but so far as its information had

3109

extended, until 1927, was an individual claim of Hermann Sielcken against Wille, which belonged to Sielcken's German estate, in which the American Executor had no interest whatever.

Mr. Sterck has also quoted at great length from deponent's brief in Matter of Sielcken before the Surrogate with regard to the status of Sielcken. The evidence in that proceeding there commented on was evidence that first came to the attention of deponent, as already stated, in 1934 and later.

3110

Our contention on this application has not been that Sielcken was in fact a loyal American in 1917, which the facts discovered in 1934 and 1935 seem to disprove, but that at the time the suit was brought and until 1934, Messrs. Avery, Alger, Hamel and Doyle and the two plaintiffs and the American Executor all believed that he had been a loyal American, and were amply justified in so believing by the information they then had; so that there was no fraud on their part in presenting the claims. It was only in 1934 and 1935 that, in following out the clues afforded by the papers that had been in the possession of both Mr. Rhodes and Mr. Martin in 1928, the facts as to Sielcken's status mentioned in that brief were discovered by deponent.

3111

As the question of Sielcken's status was discussed at length by both counsel and court during the trial of this cause, as appears by the transcript of the Stenographer's Minutes on file in this case, and was necessarily involved in the case and decision, the decree of 1929 is final and conclusive on the question, in the absence of appeal; and cannot be questioned on any such ground by this motion, as has been repeatedly held by the United States Supreme Court.

As to the correctness of the affidavit of Mr. Avery in this proceeding, verified on the 11th day of August, 1938, deponent desires to say that every statement made in Mr. Avery's affidavit was, before the affidavit was signed, carefully compared by deponent with all available data, both documentary and the personal recollections of others; and the statements in that affidavit, as far as deponent has been able to learn, are correct.

3112 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

Mr. Martin, though making an affidavit in reply, does not contradict any of the statements made by Mr. Avery. And Mr. Rhodes makes no affidavit. Mr. Avery's affidavit is thus uncontradicted.

Mr. Sterck also expatiates on the fact, which he says is, to him, incomprehensible, that $50,000 should have been paid to Wille, whom he affects to describe *a stranger to the matter*, in order to bring about the settlement.

The description of Theodor Wille as a stranger to the
3113 litigation is inept. In the compromise that was being negotiated, there was a provision for an award on the claim against Wille before the Mixed Claims Commission for about $800,000; and Wille's signature was necessary to the compromise going through.

It was a single compromise of all three proceedings—the judgment here, the Memorial against Z. E. G. and the Memorial against Wille.

One against whose interest an award is being made, under a compromise, of about $800,000, is not aptly to be described as a stranger to the matter.

Deponent finds nothing surprising in the attitude taken by counsel for claimants that a settlement that would
3114 give them several hundred thousand dollars in excess of what they had been willing to settle for, was worth securing by giving up $50,000 of the amount provided for by the stipulation of compromise.

Deponent calls particular attention to the fact, shown by Mr. Martin's minutes, offered by the moving parties, that Dr. von Lewinski, on behalf of Wille, maintained that all claims between Wille and Crossman & Sielcken, except for the claim on account of the 8,000,000 Marks of Bonds, were completely set-off by each other; and that at no time did Wille make any claim to the executor or to the plaintiffs or to anyone representing them, either in the answer to the Memorial, or otherwise, that it had any right to participate in the recovery from Z. E. G.; but what Wille postulated in March, 1930, was a flat payment to that firm of $100,000 ($50,000 by the plaintiffs and $50,000 by the Zentral Einkaufs-Gesellschaft), as a condition of Wille's consenting to the compromise involving an award of over $800,000 against them; and the

3115

settlement went through with the entire approval of Mr. Bonynge, Mr. Martin and Mr. Rhodes, with ample information with regard to all features affecting the matter.

Mr. Sterck also in his affidavit dwells at some length on the restrictions and conditions contained in the War Trade Board's license to Sorenson and Nielsen, given in November, 1917. He omits to notice that *that* license was entirely superseded by that of January 21, 1918, which contained no such provision as that so dwelt on by Mr. Sterck. Moreover, it has long since been decided that the War Trade Board had no authority to determine whether an individual was an enemy or not.

3116

Deponent further, on behalf of the executor, objects to the admissibility and competency of private papers in the office of the Alien Property Custodian in no way communicated to the executor or to the plaintiffs as against either the plaintiffs or this executor, and particularly to the following documents annexed to the affidavit of Mr. Sterck, namely:

Letter of December 18, 1917, from Joseph A. Bower to Mr. C. E. Hunter;

3117

Letter from Mr. C. E. Hunter to Mr. Joseph A. Bower of December 19, 1917;

Letter from C. E. Hunter, addressed to New York Office, dated January 9, 1918;

Letter from Mr. Charles E. Hunter, addressed to New York Office, of February 5, 1918;

Letter to Morgan M. Mann of October 18, 1918, purporting to have been signed "Bureau of Law, by ————."

To the copy of a designation of the Columbia Trust Company generally as a depositary of the Alien Property Custodian, of date December 31, 1917, as there is no reference therein to either Hermann Sielcken or Crossman & Sielcken and no intimation of any delivery or acceptance of the appointment;

Exhibit A

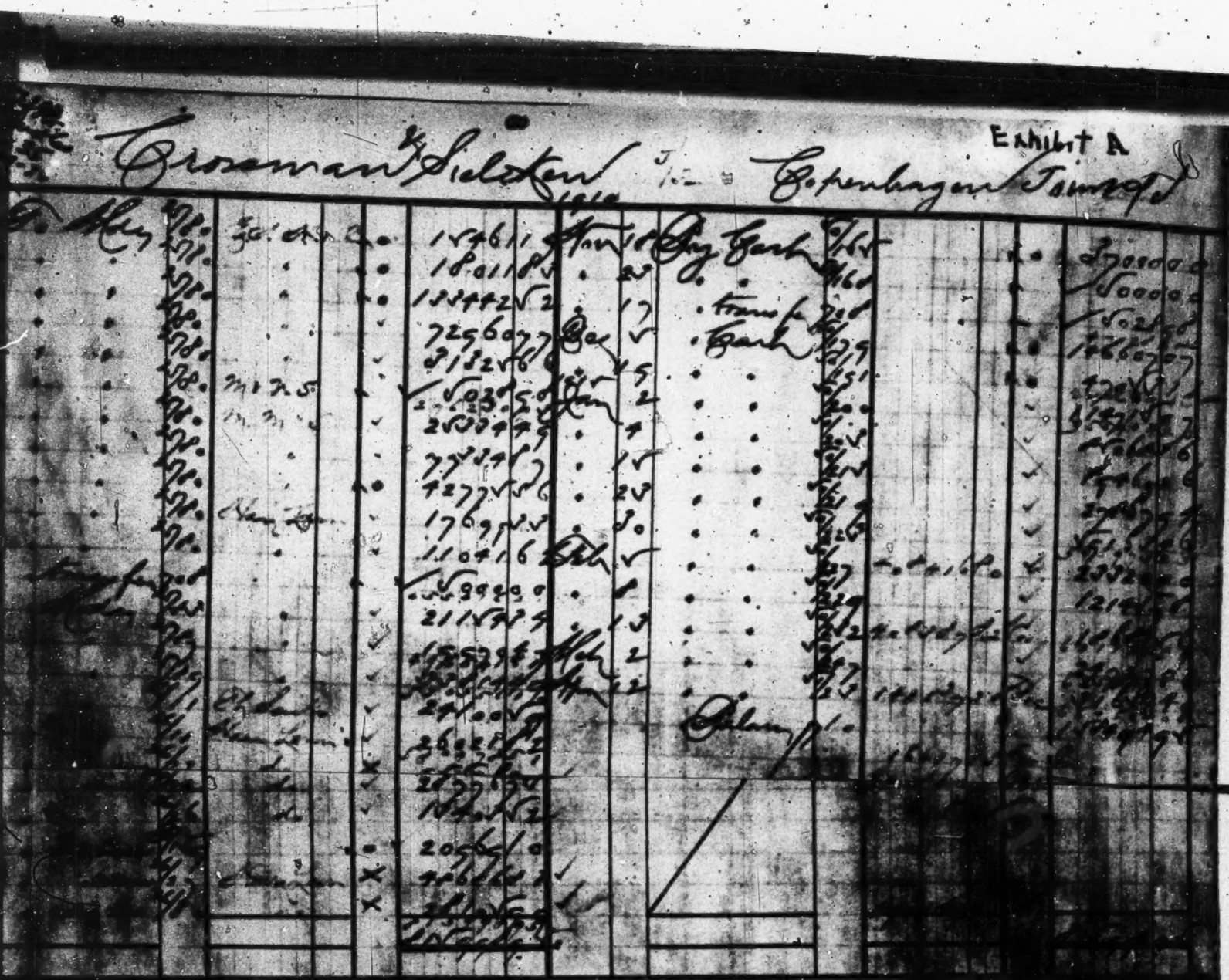
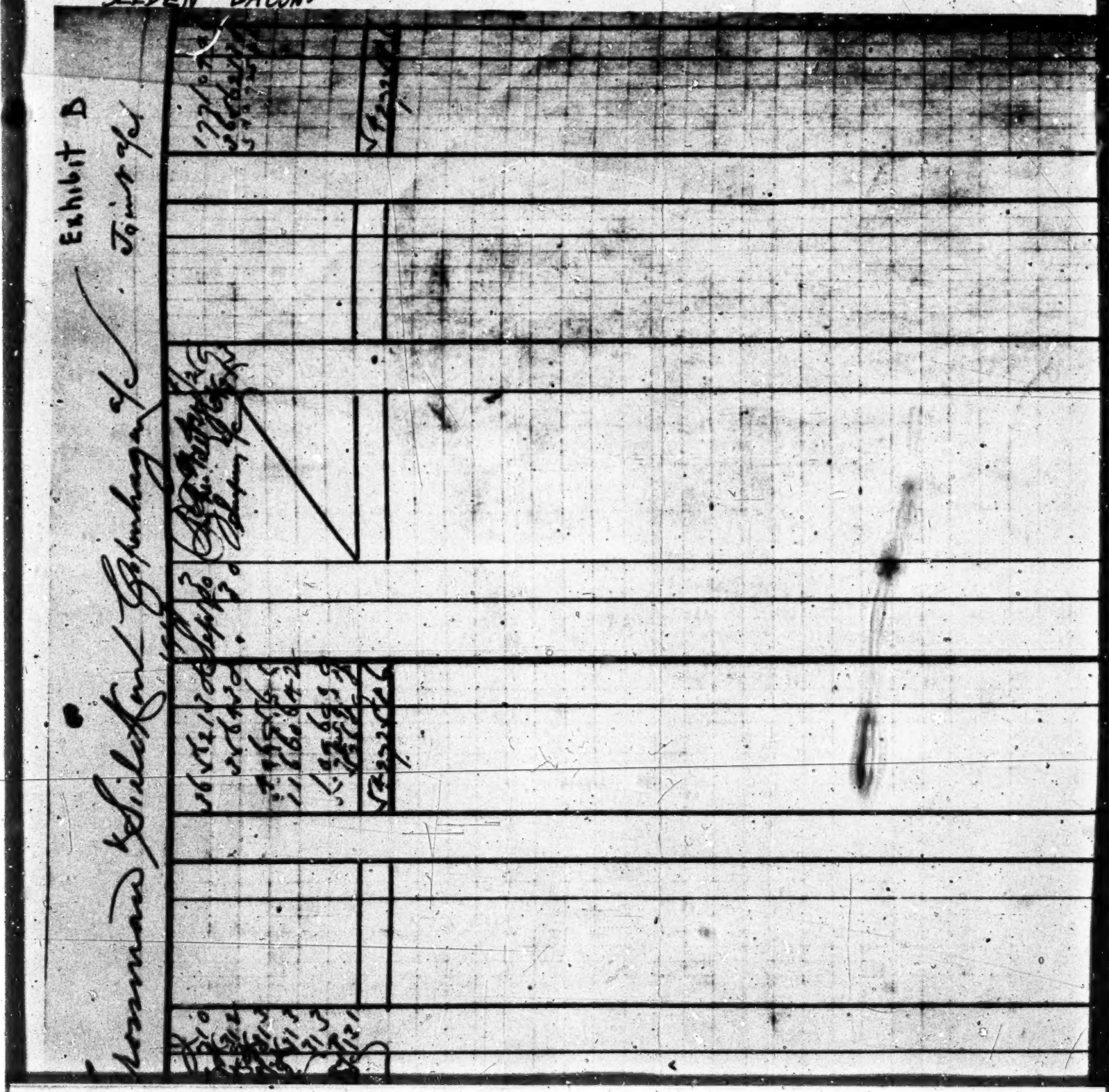
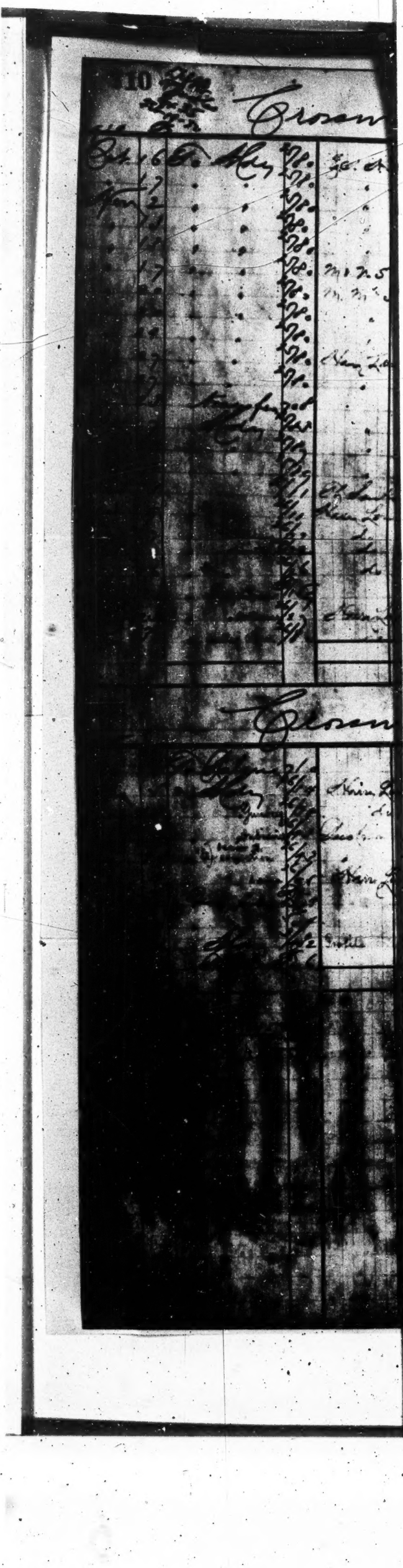


EXHIBIT A to AFFIDAVIT of SELDEN BACON.

EXHIBIT B TO AFFIDAVIT OF SELDEN BACON.





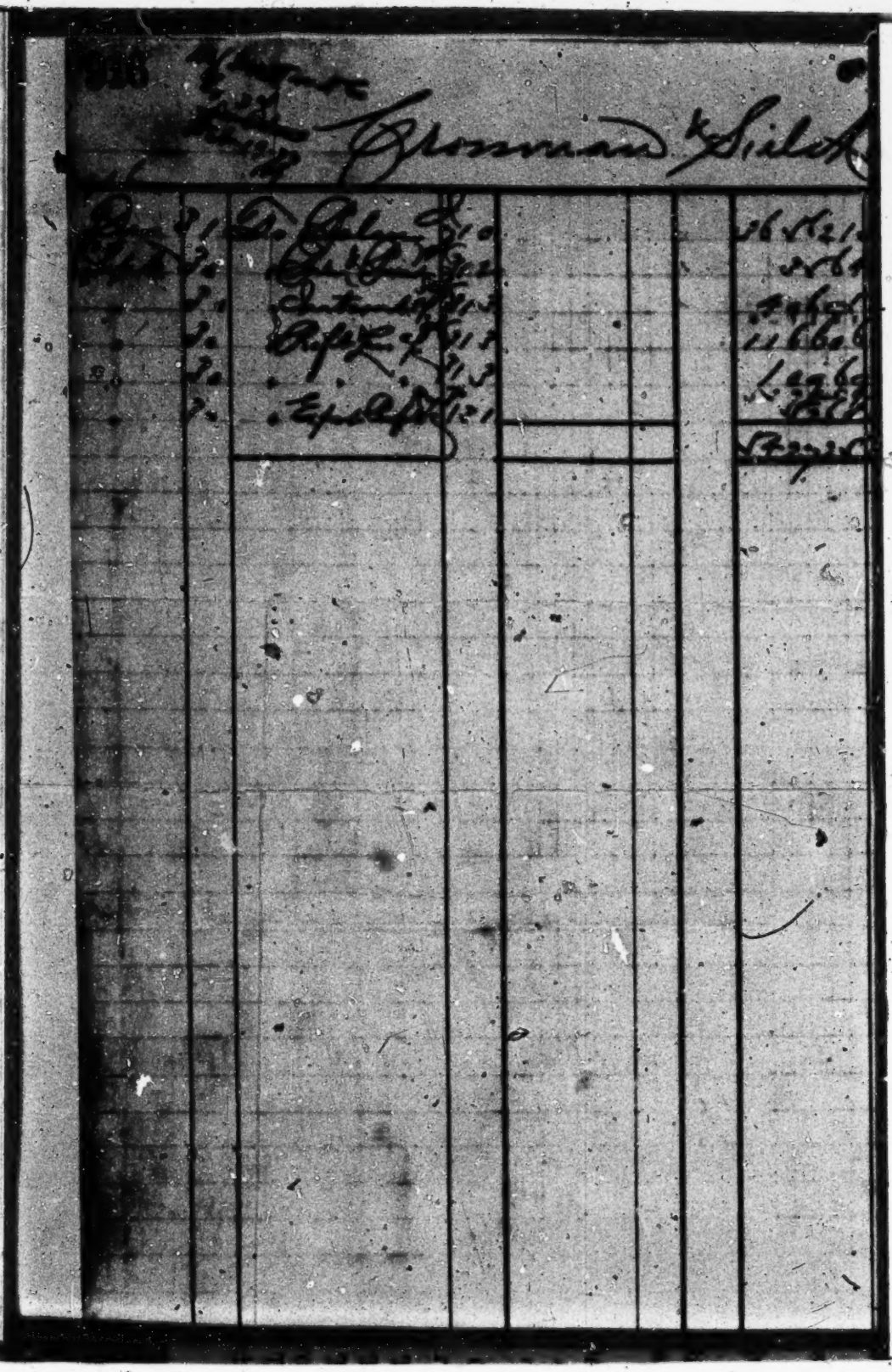


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Exhibit C.

3127

Extracts From Testimony of John S. Sorenson.

June 18, 1935.

Cross Examination by Mr. Bacon:

Q. I notice on this folio 710 of Brazilian Ledger J, both at the top of the page and on the second heading, the words, "Joint Account," and also in pencil, "J/A." A. Yes, sir.

Q. Were those part of the original entry on the ledger? A. No, sir.

3128

Q. Do you know when they were put on? A. Approximately about the early part of 1917.

Q. When that account was opened?

The Referee: Who put them on?

The Witness: The bookkeeper who wrote this. That is my writing (indicating).

Q. What is your writing? A. The two pencil marks is my writing.

Q. And the ink mark is— A. That is the accountant, the bookkeeper who kept this ledger.

Q. In the next volume of the ledger, do you find anything similar there on that account? A. Yes, sir, the same addition and the same writing.

3129

Q. Are there any pencillings there in your handwriting? A. No, sir.

The Referee: Who was that bookkeeper?

The Witness: The name is William J. Lucas.

Q. Is he still living? A. He was a year ago, because Mr. Avery—

The Referee: A year ago?

The Witness: Yes.

The Referee: You say these were put on in 1917, these two expressions of "Joint Account"?

The Witness: The early part of 1917, to my best recollection.

3130 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

The Referee: Did you see them at that time or shortly thereafter?

The Witness: Yes, sir.

By Mr. Bacon:

Q. Now, Mr. Sorenson, when did you first hear, and from whom, that Theodor Wille had any connection with this account of the Copenhagen cargo shipments? A. I learned definitely—

3131 The Referee: When did you first hear?

The Witness: In the latter part of 1914.

Q. What did you hear then? A. That he was interested, that is, in it; to what extent, I did not know; I wasn't told.

Q. From whom did you get that information? A. From Mr. Sielcken's letter.

Q. When did you get any further information with regard to that? A. When Nielsen returned in 1916, the latter part of 1916, he told me that Mr. Sielcken had advised him that Theodor Wille was one-half with us, and that he had conversations with Theodor Wille also.

3132 As we were working in the Prize Courts at the time, they agreed, Wille and he, that this participation should not be made—charged or credited on our books until the decision of the Prize Court had been received.

Q. When did you first make any charge to Wille of anything with regard to those Prize Court shipments? A. You mean the charge of the loss?

Q. Any charge to Wille. A. We did not do it; the Alien Property Custodian did it.

Mr. Spence: I object to that answer and ask that it be stricken out, as a pure conclusion.

The Referee: I think the answer should be stricken out.

The Referee: You say you never made any such entry?

The Witness: Crossman & Sielcken did not; no, sir.

Q. There is an entry on the books charging a half of that to Theodor Wille? A. Yes, sir.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3133

Q. Who made those entries? A. Arthur Young & Company.

Mr. Spence: I object to the statement about Arthur Young & Company. That is a large accounting firm. That does not mean anything.

The Referee: Who in person wrote that in?

The Witness: There were four men there at the time; I don't know which one. Our clerks did it in the office, but they directed it. They had four men at the time. 3134

Q. Who was principally active there in giving directions on the part of Arthur Young & Company? A. Mr. MacKenzie was the man.

The Referee: McGuckin?

The Witness: No; he came later.

Q. Do you know what position he held in Arthur Young & Company? A. He had a partnership interest in it.

Q. Mr. McGuckin, concerning whom the Referee asked, what was his position? A. He was a junior who came along later. 3135

Q. Now, prior to the decision of the Prize Court in November of 1917, had you made any charge of a loss on those cargoes on the books? A. We had.

Q. How had you done it? A. At the end of 1915 we charged the entire amount to profit and loss account.

Q. Did you put that anywhere else on the books? A. Keeping it in suspense account in order to have the amount open on our books.

Q. When the charge was made to Wille of half—I think it was a charge of half the cost and half the interest, was it not? A. Yes, less profits on the cargoes that were not seized.

Q. When that was done, that was carried into 1917 profit and loss account? A. Yes, sir.

Q. And that charge to Wille was first made on the books at that time? A. Yes, sir.

3136 *Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto*

Q. You charged the entire interest for the whole period, not as part of that one time, did you not; that is the way it was done on the books? A. One-half we charged him.

Q. It was all done in one item as of that date; it was not scattered back through the 1915 and 1916 profit and loss accounts; it all went into the 1917 profit and loss account, did it not? You charged that profit and loss at the time shortly after the cargoes were seized. When did you first definitely know that there was a definite, 3137 fixed loss of those cargoes? A. That was a matter of gradual development, Mr. Bacon. As we went through the year 1915, after using every endeavor in Washington, in London and everywhere else, we were baffled by the difficulty of Mr. Sielcken's citizenship. We had been in California investigating—

The Referee: Who is "we"?

The Witness: Nielsen and I had made inquiries in California, if I remember correctly—

The Referee: You said you had been in California; you said, "We had been in California."

The Witness: No.

3138

Mr. Bacon: He said they had made inquiries.

The Referee: Read it, Mr. Stenographer.

(Record repeated.)

By Mr. Bacon:

Q. You mean you personally had been there? A. We had had a man in California to investigate the possibility of establishing Mr. Sielcken's citizenship there, and everything looked very hopeless at the end of 1915, and, rather than to make any distribution of profits to export managers on this very large amount, the only thing for us to do was to charge it to profit and loss, as Mr. Sielcken did not wish to pay any income tax, particularly on such items.

Mr. Spence: I object to that statement and ask that it be stricken out.

The Referee: Strike it out.

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto

3139

Mr. Bacon: I consent that it be stricken out. I understand what is stricken out is "Mr. Sielcken did not wish to pay any income tax, particularly on such items."

The Referee: Yes.

Q. And by charging it to profit and loss and then crediting it to suspense account, you avoided the carrying of that into the profits in which the export managers shared; is that right? A. Yes, sir; it would have been 40 per cent to them in case we had not done it.

3140

Q. That is, 40 per cent of the profits? A. Yes, sir.

Q. The decision of the Prize Court was the thing that finally definitely established it was a loss, was it not? A. Yes, sir.

(Pages 3839 to 3846.)

• • • • • •

Re-cross Examination by Mr. Bacon:

Q. What was the basis of those figures that you prepared for these journal entries? A. The amount on the accounts, after the Prize Court had thrown them out of court in London, these were prepared.

3141

Q. You mean this particular one, 534? A. Both of them, sir; after the Prize Court had decided against us.

Q. 533 and 534? A. Yes, sir.

(Page 4091.)

• • • • • •

Re-direct Examination by Mr. Spence:

Q. This particular paper, being Petitioner's Exhibit No. 534, was to charge Wille on the books of Crossman & Sielcken with some $345,415.09; is that correct? A. It was to charge them with $177,000.

Q. Half of the figure I mentioned, then, $177,104? A. After making a number of adjustments; yes, sir.

Q. And that entry was prepared about when, or that

draft? A. After the middle of November, when the cargoes were thrown out of court in London.

Q. Who told you of the Prize Court decision? A. Shearman & Sterling.

Q. Who in Shearman & Sterling? A. Mr. Forbes. We had it in writing, I know.

Q. How did you have it in writing? A. They sent us a letter.

Q. Who? A. Shearman & Sterling, and they enclosed a letter from Burn & Berridge of London, stating the
3143 facts.

Q. Where is that? A. The letter?

Q. Yes. A. I have copies of those home.

Q. Will you bring those down, please? A. Yes, sir.

Q. You have those letters, and you will bring them down? A. I have copies; yes, sir.

Mr. Spence: That is all.

Re-cross Examination by Mr. Bacon:

Q. Had the half share in the Copenhagen cargoes been previously charged up to Wille on the books? A. No, sir?

3144 Q. Why not? A. The prime reason was that it was a German account, and, with the condition of affairs in New York, we did not dare to put a German account as a participant in our business on our books, and it was agreed between Mr. Nielsen and Theodor Wille that so long as those things were in the London Prize Court, where we stated that we were the owners of it, that nothing would be put on the books against Theodore Wille.

Q. You say that was agreed between Nielsen and Wille? A. Yes, in 1916 when he was there, when he learned that they had a half share in it.

Q. All you know about that is what Mr. Nielsen reported to you? A. Yes, sir; and to Arthur Young & Company, who in turn had reported it to Washington.

(Pages 4091-4093.)

• • • • • •

Affidavit of Selden Bacon, Verified September 23, 1938, and Exhibits A, B and C Thereto 3145

Re-direct by Mr. Spence:

Q. I thought you said from 1916 on you decided that it was not well to enter anything on the books regarding Theodore Wille.

The Referee: He said with regard to Wille's interest.

Mr. Spence: That is what I mean.

A. This is the beginning of Wille's interest (indicating). There was nothing on Wille's account in this connection until this entry was made, sir. 3146

Q. So that anybody examining the books, no matter how detailed was the examination, could ever know anything about Wille's interest in those cargoes? A. That is right, sir.

Q. That was entirely dependent upon your private memoranda? A. Yes, sir. I had no private memorandum on that. There was nothing anywhere to show that Wille had a share.

The Referee: You knew it?
The Witness: I kept it quiet.
The Referee: Nielsen knew it? 3147
The Witness: Yes; nobody else in the office.
The Referee: And Mr. Sielcken knew it?
The Witness: Yes.

(Pages 4095-4096.)

3148 **Affidavit of George W. Alger, Verified September 7, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
3149 HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28. Affidavit.

State of New York,
County of New York, ss:

3150 George W. Alger, being duly sworn, deposes and says that he is a member of the bar of the State of New York and of the bar of this Court, and has been such for over thirty-five years last past.

Deponent further says that he was retained as associate trial counsel in the trial of the above-entitled cause, and that he participated later in discussions with reference to negotiations for a settlement of all the claims of the firm of Crossman & Sielcken against Theodor Wille and Zentral Einkaufsgesellschaft in the early part of the year 1930, and in a threatened counterclaim of said Zentral Einkaufsgesellschaft.

The lawyers with whom I was associated in connection with the case included Mr. Earl B. Barnes, an attorney of this court (now deceased), his partner Mr. Brainard Avery, and in a minor degree with Messrs. Whiting and Castell of Mr. Avery's firm, and also with Hon. Charles D. Hamel, formerly a member of the United States Board

of Tax Appeals, and Mr. Richard S. Doyle, who was then Judge Hammel's partner.

The Alien Property Custodian and the United States Treasurer appeared in the action by Mr. Charles H. Tuttle, then United States District Attorney for the Southern District of New York, and Mr. Thomas E. Rhodes, an Assistant Attorney-General of the United States who conducted the trial of the case on their behalf.

The Zentral Einkaufs-Gesellschaft was represented in the suit by Mr. Arthur Garfield Hays and his partner, Mr. Abramson. Mr. Hays conducted the trial on behalf of 3152
this defendant.

I was informed from time to time by one or more of the attorneys above named with reference to communications which were made by my associates with Mr. H. H. Martin and with Mr. Robert W. Bonynge, the American agent for the Mixed Claims Commission United States and Germany, Mr. Martin being one of Mr. Bonynge's associates in the work of the Mixed Claims Commission.

To the best of my knowledge no claim had been made at any time prior to the actual trial of this case that either the firm of Theodor Wille or Zentral Einkaufs-Gesellschaft claimed or would claim to participate in the recovery in this action in any way. 3153

After judgment had been rendered in favor of the plaintiffs in this case, I was later informed, I think by Mr. Avery, that a claim was being asserted by Zentral Einkaufs-Gesellschaft. As I recall, the nature of that claim was substantially this: that the Zentral Einkaufs-Gesellschaft held an indemnity agreement from the German Executors of the late Hermann Sielcken undertaking to indemnify and hold harmless the Zentral Einkaufs-Gesellschaft from any recovery the firm of Crosman & Sielcken might make from them on account of the cargoes involved in this suit. I was advised by Mr. Avery and one or more of his associates, that this claim might readily have its serious aspects, and would involve a difficult question of German law. I was shown the opinion of a German lawyer, formerly a judge of the Commercial Court of that

3154 *Affidavit of George W. Alger, Verified September 7, 1938*

country, stating that in his opinion this so-called indemnity agreement was invalid under German law because it was executed on the part of the estate of Herman Sielcken by the German Executors of his estate, which Executors, it appeared, had personal interests involved in the matter adverse to those of the estate of Hermann Sielcken. Dr. Neumann, the German lawyer to whom I refer, had advised that in his opinion the contract was invalid under German law for that reason.

I do not recall when I first saw this opinion, but I am quite clear that it was a considerable period after the
3155 actual trial of the case. Whether or not the opinion of this German lawyer was sound would have to be determined in the courts of Germany if litigation arose. If decided adversely to the estate, there were ample assets of the estate in Germany, as I was advised, to satisfy this claim if found to be sound.

Mrs. Clara Sielcken Schwarz, the decedent's widow, was the sole residuary legatee of both the estate of her deceased husband in this country and of his estate in Germany.

I did not participate in the negotiations for the compromise of this claim with reference to this indemnity agree-
3156 ment. I was informed from time to time by Mr. Avery or some of the other lawyers associated with the matter, as to negotiations for its adjustment. It was, naturally, immaterial to the residuary legatee, if the claim with reference to this indemnity agreement were adjusted, whether whatever was paid in compromise of that indemnity agreement was paid out of the estate of the deceased in this country or whether out of his estate in Germany.

As far as I can now recall, the only defense to this indemnity agreement which I heard discussed was that stated above, the invalidity, for the reasons stated by Dr. Neumann, of the indemnity agreement itself.

My substantial connection in the matter was that of assisting Mr. Barnes in the preparation of the law and facts on the trial of the case itself. I was, however, present later on two occasions when there was a discus-

sion of negotiations for the adjustment of the indemnity matter and for adjustment with the firm of Theodor Wille and Germany.

I have read the memoranda of Mr. H. H. Martin covering two of these meetings, viz, January 9, 1930, and March 17, 1930, and giving in detail the substance of the discussion at the two meetings held at the office of the Mixed Claims Commission at which I was present together with Mr. Earl B. Barnes, Brainard Avery, Mr. Richard S. Doyle, and the American and German Agents before the Commission, and the counsel for each of them, and Mr. Abramson who was a partner 3158
of Mr. Arthur Garfield Hays who was attorney for the Zentral Einkaufs Gesellschaft, and which discussion related to the settlement of the claim presented by the Memorial against Wille and the claim advanced by Zentral Einkaufs Gesellschaft for indemnity against the German Executors of the Hermann Sielcken estate.

At these meetings both the American Agent and the German Agent and their respective counsel took the position that this claim for indemnity advanced by Zentral Einkaufs Gesellschaft was an independent matter entirely outside the scope of the jurisdiction of the Commission, and which the parties were entirely at 3159
liberty to settle for themselves if they saw fit irrespective of the claims advanced by the estate or the firm of Crossman & Sielcken against the Zentral Einkaufs Gesellschaft and Wille. I recall that Mr. H. H. Martin, counsel for the American Agent, stated at the first of these meetings, that it would seem to him that the claim for indemnity was and might be a serious matter which those interested in the estate of Hermann Sielcken were well justified in compromising, but that it was not a matter which concerned him and was something for them to determine if they chose.

I recall at this meeting of January 9, 1930, that a tentative settlement of the matters before the Commission was considered and in general approved by the parties concerned, except that Dr. von Lewinski, German

3160 *Affidavit of George W. Alger, Verified September 7, 1938*

Agent, said that before reaching any definite arrangement he would have to consult with the authorities in Berlin with regard to the settlement of the claim against Wille which it was then proposed to compromise on a basis of sixty per cent (60%) of certain particular items of the claim, viz, claim for depreciation of the German bonds supposed to have been held by Wille, or for a debt from Wille if Wille had not purchased the bonds but had "bucketed" the transaction.

I do not recall any further discussion of the matter of compromise until March 17, 1930, when I was again
3161 in Washington at a conference at the office of the Mixed Claims Commission with substantially the same persons present as at the prior meeting. I have no independent recollection of the date of this meeting except from the reading of Mr. Martin's memorandum as of that date, which I have read, and which refreshes my recollection, and which appears to be entirely accurate. At this meeting the German Agent, Dr. von Lewinski, advised us that the best offer he could make was fifty per cent instead of sixty per cent of the claim against Wille, mentioned above. This modification called for an award of $558,827.85, with interest at
3162 5% from April 1, 1918, on the Wille claim. After separate conference between counsel for the claimant this adjustment was approved, and the American Agent so advised on that date. I have no recollection of any personal participation by me in the discussion at these hearings. I was, however, present at them both, and Mr. Martin's memoranda seem to me complete as to the entire subject-matter discussed, as above stated. I have no recollection of having anything further to do personally with the settlement of the litigation.

To the best of my recollection there were no negotiations with reference to settlement until at least a week or ten days after the entry of judgment in favor of the plaintiffs in this case, and I have no recollection of any negotiations other than those outlined above.

Affidavit of George W. Alger, Verified September 7, 1938. 3163

At no time did I ever hear any suggestion that anything should be done in this matter without the full knowledge of the United States counsel interested in the various matters.

GEORGE W. ALGER.

Sworn to before me this
7th day of September, 1938.
Frederick H. Rohlfs,
Notary Public,
Kings County.
Kings Co. Clk. No. 7, Reg. No. 109. 3164
N. Y. Co. Clk. No. 56, Reg. No. O-R-45.
Commission expires March 30, 1940.

3165

3166 **Affidavit of Brainard Avery, Verified October 20, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken, Plaintiffs, against 3167 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H., Defendants. In Proceedings to Vacate Final Decree of December 30, 1929.	Equity No. 44-28. Affidavit.

State of New York,
County of New York, ss:

3168 Brainard Avery, being duly sworn, says:

I have read the letter from Mr. Martin of date September 21, 1938, copy of which is annexed to the supplementary affidavit of Mr. Sterck verified October 10th, 1938.

I notice that Mr. Martin, after carefully reading my long affidavit of August 11th, 1938, suggests but two slight differences between his recollection and mine after a lapse of eight years of the occurrences of January to March, 1930.

One of these is negligible. He agrees that he may have given me a message from Dr. von Lewinski that he (von Lewinski) would like to have a talk with me in regard to the settlement and that he (Martin) suggested that there was no objection whatsoever on the

part of the American Agency to my doing so; but he feels certain that he did not tell me at that time that it was "unusual for the German Agent to have personal conferences with counsel for claimants." And he adds that "Such procedure was not 'unusual,' particularly where such conferences was requested by the German Agent." Mr. Martin does not mention when any such other cases of conference arose, they may have been later than this one, and this the first instance of the kind. That he did make such remark to me was my recollection after eight years. He apparently thinks I am in error as to this detail though he makes no affidavit to that effect. He did not contradict the statement in his affidavit herein of September 14th, 1938. The point seems wholly immaterial in itself. 3170

The other point Mr. Martin criticizes is my statement that it was on March 17th, 1930, that I was present at a certain conference with Mr. Bonynge and Dr. von Lewinski. Mr. Martin does not dispute the fact that there was such a conference, or that what I have stated as occurring at that particular conference actually occurred. He merely questions the date.

As shown at page 44 of my affidavit verified herein August 11th, 1938, on Friday, March 14, 1930, at the request of Dr. von Lewinski, I sent the telegram to Mr. Bonynge shown on page 44 of that affidavit, reading as follows: 3171

"Hon. Robert W. Bonynge, American Agent
German Mixed Claims Commission,
Investment Building,
Washington, D. C.

"Doctor von Lewinski transmits through ZEG: New York lawyer Mister Hays requests for meeting Washington Monday morning March seventeenth stop Modifications of tentative settlement made January ninth are suggested which include settlement with Theodor Wille stop Mister Hays and myself will reach Washington Monday morning unless you wire to contrary.

BRAINARD AVERY."

I call particular attention to the specification of the *morning.*

The occasion of sending that telegram was that Dr. von Lewinski had that day stated to me at Mr. Hays' office the lines on which he believed he was authorized to conclude a compromise of all the various matters involved which were ultimately disposed of by the compromise; and I declined to take up that matter except concurrently with Mr. Bonynge and Mr. Martin, as I had been instructed by Mr. Bonynge to conclude
3173 nothing without his knowledge in advance. It was because of these instructions from Mr. Bonynge that the meeting was sought with him personally.

The same day, March 14th, 1930, I sent the following telegram to my associate Mr. Richard S. Doyle, who was then in New Hampshire:

"Richard S. Doyle,
c/o George Brown,
Tilton, N. H.

von Lewinski submits through Hays offer settlement entire matter including ZEG stop Offer appears feasible with some modifications stop von Lewinski wants meet
3174 with us Bonynge Monday morning Washington Hope you can surely be there.

BRAINARD AVERY."

The same day, March 14th, 1930, I sent the following telegram to my associate Mr. Alger, who was then in Atlantic City, New Jersey:

"George W. Alger,
Hotel Chalfonte,
Atlantic City, N. J.

Dear George vonLewinski submits through Hays offer settlement entire matter immediately including ZEG stop Offer appears feasible with some modifications stop vonLewinski wants meet with us Bonynge Monday morn-

ing Washington Can you go stop Suggest you meet me Congressional Limited North Philadelphia Sunday afternoon Wire or telephone Newyork Hope you are rested.

BRAINARD AVERY"

The same day I wrote to my associate Judge Hamel in Washington saying:

"Please arrange that we can surely have Mr. Bonynge and Mr. Martin available on Monday morning."

According to my recollection I heard from Judge Hamel by telephone the following morning that the appointment was confirmed, and I at once advised Dr. von Lewinski of the confirmation of that appointment through Mr. Hays' office. 3176

I accordingly went to Washington from New York and was there Monday morning, March 17th, 1930.

Mr. Barnes also came down from New York for that meeting, Mr. Alger from Atlantic City, Mr. Doyle from New Hampshire.

Dr. von Lewinski, Mr. Hays and Mr. Abramson were also there in Washington that morning pursuant to that appointment.

The presence of all these gentlemen in Washington that morning was not casual. 3177

After a brief conference between myself and my associates at Judge Hamel's office we went to Mr. Bonynge's own room in the suite of the American Agent, at 15th and K Streets, N. W., Washington, at about 10 or 10:30 a. m. and we there found, as I recall it, Mr. Bonynge and Mr. Martin also. I then told Mr. Bonynge what had occurred with Dr. von Lewinski at Mr. Hays' office on March 14th, 1930. After considering this he sent for Dr. von Lewinski, whose office was on a different floor of the same building. A few moments later and not later than about 11 a. m. Dr. von Lewinski came in with, I think, two of his German counsel, and also Mr. Hays and Mr. Abramson, the counsel for the Zentral Einkaufs-Gesellschaft. The ensuing conference

of that morning was held in Mr. Bonynge's personal room. What followed in the discussion at that morning session dealt primarily, if not exclusively with the adjustment of the indemnity claim of the Zentral Einkaufs-Gesellschaft and the demand of Wille for $100,000 to be contributed half by us and half by the Zentral Einkaufs-Gesellschaft.

These subjects Mr. Bonynge and Mr. Martin had both stated they did not consider business of the Mixed Claims Commission, but they had insisted on knowing beforehand all about any settlement of these claims and any
3179 negotiations therefor.

The fact that Mr. Martin's notes do not show anything about this conference on those subjects is perhaps explained by the fact that he had admittedly deliberately omitted from his minutes of the January 9th, 1930 conference the discussion that there occurred of the terms of the proposed settlement with the Zentral Einkaufs-Gesellschaft on the ground that he did not consider it a matter that officially concerned the Commission.

We discussed these matters there that morning for about two hours and then separated for lunch. At 2:30 the afternoon conference met in Mr. Martin's room.
3180 And, as I recall it, Mr. Bonynge did not attend that *afternoon* meeting.

It was at that conference on Monday morning that occurred the incidents that I detailed in my affidavit as occurring on that day, which are not shown in Mr. Martin's minutes of the more formal afternoon conference of that day.

Mr. Martin's notes are in error in the suggestion—although not positive statement—that Mr. Hays and Mr. Abramson, Mr. Doyle, Mr. Alger and I were in the City casually. On the contrary we were there to keep the definite appointment that had been made with Mr. Bonynge, the American Agent, with Dr. von Lewinski, the German Agent, and Mr. Hays for *Monday morning*, March 17th, 1930.

In preparing my original affidavit I had dealt with the entire proceedings of that day as one conference.

From Mr. Martin's point of view it would naturally be regarded as two conferences, one as to matters not within the jurisdiction of the Commission, and the other—the afternoon session—as a conference over matters in which the Commission was concerned.

At the afternoon conference, the matters were taken up on the basis that had been discussed in the morning. The figures were then carefully gone over and the terms of the stipulation for award and the ultimate figures of the Wille award were arrived at.

Mr. Martin's statement in his letter that Mr. Bonynge was not in Washington on March 17, 1930, seems, from the context of his letter, to be an inference drawn from his notes, which do not show the presence of Mr. Bonynge in the afternoon, and his report to Mr. Bonynge by letter the following day as to occurrences at the conference of Monday afternoon. 3182

These two data from which he draws the inference—he does not apparently attempt to speak from personal recollection after eight years—are entirely compatible with Mr. Bonynge's having been in Washington Monday morning. There is no incompatibility between the two facts.

Deponent's letter to Mr. Bonynge of March 10, 1930, and Mr. Bonynge's reply of March 11, 1930, which appear on page 42 of my original affidavit, and Mr. Martin's own letter to Mr. Bonynge of March 18, 1930, all show that both Mr. Martin and Mr. Bonynge, before the meeting of Monday afternoon, March 17, 1930, were entirely familiar with the details of the matter, not only of the compromise of the indemnity agreement held by the Zentral Einkaufs-Gesellschaft, but with the demand of Wille for $100,000, to be contributed half by us and half by the Zentral Einkaufs-Gesellschaft, and that the whole situation in all its details was fully known to them and approved by them, including both the payment to the Zentral Einkaufs-Gesellschaft and the payment to Wille. That is the essential fact to which I made affidavit, which Mr. Martin does not attempt to question. 3183

3184 *Affidavit of Brainard Avery, Verified October 20, 1938.*

I have also examined the affidavit herein of Mr. Sterck verified the 10th day of October, 1938, as to statements said to have been made to him or to Mr. McNamara by Mr. Rhodes.

I call attention to a few of the statements therein.

In the first place Mr. Rhodes is quoted as saying that he remembers my calling on him with Mr. Barnes "in the early part of 1928, and that at that conference Mr. Barnes did most of the talking, but that he does not recall the conversation. That call was in June, 1928, after my return from Germany, and the conversation
3185 was as stated by me in my affidavit herein of August 11th, 1938.

On page 2 of that affidavit of Mr. Sterck's he says that Mr. Rhodes said that it had been represented to him at all times after the receipt of the letter of December 7, 1928, from Mr. Doyle, of which a copy is annexed to the affidavit, that by reason of the *decision* of Judge Neumann there was no liability whatsoever on the part of the plaintiffs. Mr. Doyle's letter, which is annexed as an exhibit to that affidavit, is specific in its statement that the question was referred "for an *opinion*" to Dr. Neumann. A copy of the opinion of
3186 Dr. Neumann is attached to my former affidavit and it does not purport to be a decision but an opinion of counsel.

We never stated to Mr. Rhodes that there was no liability to the Zentral Einkaufs-Gesellschaft; and it was not claimed that there was any liability on the part of the plaintiffs. What was stated to Mr. Rhodes was that we contended that in accordance with the opinion of Judge Neumann the indemnity agreement was not valid; but we all recognized the very serious question presented by that document and the fact that any trial of that question would be conducted in a German Court by a plaintiff which represented the interests of the German Government.

Mr. Rhodes was informed in 1928 that the Zentral Einkaufs-Gesellschaft was asking that a very consider-

able sum of money be paid it in satisfaction of that claim, and he was told at that time that these advances on the part of the German authorities were rejected. Neither the Zentral Einkaufs-Gesellschaft nor the firm of Wille asserted any interest in the proceeds of the suit. No arrangement to pay them anything was ever made until months after the decree; and Mr. Rhodes certainly could not have raised any issue at the trial on that score.

It is very obvious from the letter of Mr. Doyle to Mr. Rhodes of December 7, 1928, of which a copy is annexed to Mr. Sterck's affidavit, that the conference of 3188
June, 1928, had nothing to do with the matter of stipulating unquestionable facts, for that letter opened with the statement that the letter is written in accordance with the suggestion made by Mr. Rhodes on November 28, 1928.

As to the statement in the last paragraph on page 5 that Mr. Rhodes stated that if it had been disclosed to him that Hermann Sielcken was an enemy within the meaning of the Trading With the Enemy Act and was the owner of all the capital assets of the firm, and that the said assets passed to the executor of Hermann Sielcken upon the death of said Sielcken, he would have 3189
raised the question of the jurisdiction of this Court at the trial. In point of fact the stenographer's minutes of that trial establish clearly that Mr. Rhodes asserted, with all the vigor at his command, that Sielcken was an enemy within the meaning of the Trading With the Enemy Act. Those minutes disclose also that the partnership articles, which provided that all the capital assets of the firm were the property of Sielcken and that the assets pass to the executor of Sielcken upon his death, were put in evidence at the trial, and those precise terms of the partnership articles were called to the attention of the Court at the trial. I was present throughout the trial. I annex extracts from those minutes, which could not have been called to the attention of Mr. Rhodes recently, or he certainly would not have made any such

3190 *Affidavit of Brainard Avery, Verified October 20, 1938*

statement. Those extracts are marked Exhibit A and are hereby made parts of this affidavit.

It would seem that either Mr. McNamara or Mr. Sterck misunderstood Mr. Rhodes or that Mr. Rhodes misunderstood them.

BRAINARD AVERY

Sworn to before me this
20th day of October, 1938.
William G. Phillips,
Notary Public.

3191 Nassau Co. N. Y. No. 1021.
Certificate filed in N. Y. Co. No. 108.
N. Y. County Register's No. 0-P-63.
My Commission Expires March 30, 1940.
(Notarial Seal.)

Exhibit A.

"Mr. Barnes: This suit, if your Honor please, is brought under Section 9 of the Trading with the Enemy Act.

3192 "The plaintiffs are the surviving liquidating partners of Crossman & Sielcken, a New York copartnership.

"There are two defendants, perhaps three defendants, the Alien Property Custodian, the Treasurer of the United States, those two being made defendants as required by the provisions of the Act, and then a German corporation by the name of Zentraleinkaufs-Gesellschaft, to which, for the sake of brevity, we have learned to refer as Z. E. G.

"The object of the suit is to secure payment to the plaintiffs from property of Z. E. G. which is held by the Custodian and the Treasurer of a debt which the plaintiffs claim was owing to them by Z. E. G. The amount claimed is $380,761 with interest.

"All of the defendants have appeared in the suit and have answered and are before your Honor.

"It is not the case with which you are most familiar, of a claimant endeavoring to get his own property back. We have had a great many of those claims. But this suit is brought under that provision of the Act which says that any person to whom a debt is owing may bring a suit to establish the debt. In other words, the Government has given practically an attachment remedy to American firms for the payment of their claims against enemies out of this fund.

"The claim here arises out of transactions that took place in the spring of 1915 when Germany and England were at war and of course several years before this country entered the war. The defendant Z. E. G. at that time was the purchasing agency of the Imperial German Government. 3194

"The Court: Were the transactions completed prior to the entry of this country into the war?

"Mr. Barnes: All of the transactions were completed in the spring of 1915, two years before this country entered the war.

"The claim arises by reason of the seizure by the British Government of six shipments of food which were purchased in this country by the plaintiffs and were shipped to neutral Baltic ports on neutral vessels consigned to persons in Copenhagen. 3195

"These vessels on the way over were intercepted by the British and they seized these particular food cargoes and took them to a British port and condemned them [illegible] the ground that they were contraband of war, [illegible]ey were destined for consumption in Germany. That is how this particular litigation has arisen.

"The plaintiffs' contention is that in purchasing and shipping these cargoes they were acting merely as purchasing agents of the defendant Z. E. G., that we consigned them to persons designated by Z. E. G. and that we were to be repaid by Z. E. G. our advances for the cost of the merchandise and our advances for the shipments and for the freight and for the insurance and a commission of 10%.

3196 *Affidavit of Brainard Avery, Verified October 20, 1938*

"That was the understanding between the parties, that we were acting over here to buy this stuff for Germany and to ship it under a 10% commission for our services and we were to advance the money.

"The amount involved represents the invoice value, the freight, the insurance and the 10% commission on these six seized cargoes.

"Of course what happened here took place fifteen years ago. The original arrangements were made in September of 1914. At that time Hermann Sielcken, the senior member of the plaintiffs' firm, Crossman & Sielcken, was in Germany. He had a summer place in Germany and it was his custom to go there every summer. At the time when this war suddenly broke out, as you recall, between the Allied Powers and the Central Powers, Mr. Sielcken and his family were in Germany."

3197

(Pp. 2-4.)

* * * * * * *

"Mr. Rhodes: Your Honor, may I say a word on that? The Trading with the Enemy Act defines an enemy as any individual, partnership or any body of individuals of any nationality resident within the enemy territory.

3198 "The Court: Exactly.

"Mr. Rhodes: The language does not say 'nationality' but it says 'resident within.'

"The Circuit Court of Appeals of this Circuit has held that 'resident within' means domiciled in the case of *Stadtmuller v. Miller.*

"The Court: I agree with that.

"Mr. Rhodes: And then it goes ahead and says in Section 3:

> "'* * * of any person in the United States except with the license of the President granted to such person, or to the enemy or allied enemy as provided in this Act, to trade, or attempt to trade, either directly or indirectly, with, to or from, or for, or on account of or on behalf of, or for the benefit of any other person with knowledge or reasonable cause

to believe, that such other person or enemy or allied enemy is conducting or taking part in such trade, directly or indirectly, for, or on account of or on behalf of, or for the benefit of the enemy or allied enemy* * *"

is unlawful to do that, and it goes ahead and provides penalties to do that.

"If this partnership continued the conduct of the business by the American partner, residing in the United States, it would be in part for the benefit of the home partner, Sielcken, whom this evidence here shows was 3200
domiciled in Germany.

"He had his estate over there; he lived there. His office was there, and his business was there. That was his home and domicile. That would be in clear violation of the Act for the American partner to continue to carry on the business for him; so it must obviously follow that the partnership was dissolved upon the declaring of war because nowhere in the Act is there based upon citizenship any standard, but it is based upon domicile."

(Pp. 73-74.)

* * * * * *

"Mr. Rhodes: But, your Honor, the purpose of Con- 3201
gress was to place all persons resident in Germany, because Congress realized that some of the most dangerous enemies we had were American citizens that came over here and made their money and went back to Germany."

(P. 76.)

3202 **Affidavit of Selden Bacon, Verified October 18, 1938.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,
against
HOWARD SUTHERLAND as Alien Property 3203 Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Equity No. 44-28
Affidavit.

State of New York,
County of New York, ss:

3204 Selden Bacon, being first duly sworn, deposes and says:

That deponent, on July 26, 1938, being desirous of checking in every way the correctness of the statements later embodied by Mr. Brainard Avery in his affidavit of August 11, 1938, in this proceeding, saw Mr. Thomas E. Rhodes of Washington, who tried this case in 1929 for the United States Treasurer and the Alien Property Custodian as counsel for them.

That Mr. Rhodes stated to deponent that he had seen a copy of the indemnity agreement executed by the German Executors of Sielcken to the Zentral Einkaufs-Gesellschaft, and had known about it prior to the trial of the suit.

Mr. Rhodes also stated that he desired to make no affidavit in the matter; that he had been approached

 3205

by the Department of Justice with the request that he make an affidavit and had declined to do so unless he first had full opportunity to examine his own files and memoranda of 1927 to 1929, so as to be sure he made no mistake.

Mr. Rhodes also told deponent that he was satisfied he had been treated by all the counsel for the plaintiffs in this suit with openness and he told deponent that Mr. Abramson, Mr. Hays' partner, had been in to see him in the spring of 1930, and had told him that they were making a settlement and not going to take an appeal. This statement by Mr. Rhodes to deponent was 3206
the first information deponent had of any conversation on that subject between Mr. Rhodes and Mr. Abramson. On the strength of it, deponent inquired of Mr. Abramson, who made the brief affidavit, dated August 5, 1938, included in the answering affidavits put in on behalf of the Irving Trust Company.

Deponent further says that he has recently been furnished by Mr. Martin with an extract from his letter to Mr. Bonynge of March 18, 1930. The information given deponent on that subject by Mr. Martin reads as follows:

"I furnished Mr. Bonynge on March 18, 1930, with 3207
a copy of my memorandum of March 17th. In my letter to Mr. Bonynge I had the following to say with reference to the conference:

"'After a rather extended conference on the subject it was finally decided by claimants, concurred in by me, to accept the revised offer. The claimants were influenced to a certain extent in arriving at this decision by the fact that they are to receive from the firm of Theodor Wille, a general release of all claims that that firm may have against Crossman & Sielcken. This release claimants were assured, by Mr. Hayes, concurred in by the German Agent, would be forthcoming.

3208 *Affidavit of Selden Bacon, Verified October 18, 1938*

"'I explained to the parties that the questions of claims that the firm of Theodor Wille might possibly have against Crossman & Sielcken was of no more concern to the Agency than is the question of the possible claims arising out of the so-called indemnity agreement involved in the Z. E. G. claim, and that the Agency was not directly concerned with either of these matters.'"

SELDEN BACON.

3209 Subscribed and sworn to before me this
18th day of October, 1938.
James S. Ogsbury, Jr.,
Notary Public.
Nassau Co., N. Y. No. 1870.
Certificate filed in N. Y. Co., No. 180.
N. Y. County Register's No. 0-O-105.
My Commission expires March 30, 1940.
(Seal).

3210

Warrant for Satisfaction of Decree of December 30, 1929. 3211

IN THE UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, WALTER O. WOODS as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

Equity No. E 44-28 3212

To the Clerk of the United States District Court for the Southern District of New York:

Whereas, the plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of Crossman & Sielcken, did on the 30th day of December. 1929, obtain a decree in the United States District Court for the 3213
Southern District of New York against the defendants, which was filed in said court on January 2, 1930, and which directed the defendants, Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, to forthwith convey and deliver to said plaintiffs the sum of $716,160.37 (Seven Hundred and Sixteen Thousand, One Hundred and Sixty and 37/100 Dollars), together with interest thereon at the rate of 6 per cent from the date of said decree to the date of the payment thereof to the plaintiffs, which sum constituted final satisfaction of said decree.

And Whereas, the plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, have received from Howard Sutherland, as Alien Property Custodian, and Walter O. Woods, as Treasurer of the United States, the sum

3214 *Warrant for Satisfaction of Decree of December 30, 1929*

of $716,160.37 (Seven Hundred and Sixteen Thousand, One Hundred and Sixty and 37/100 Dollars), together with interest thereon in the sum of $11,458.56 (Eleven Thousand, Four Hundred and Fifty-eight and 56/100 Dollars) in final satisfaction of said decree entered in in this case;

These Are, Therefore, to desire and authorize you to enter an acknowledgment of the final and complete satisfaction upon the record of said decree and for your so doing, this shall be your sufficient warrant and discharge in that behalf.

3215 In Witness Whereof, we, as solicitors of record of the said plaintiffs, John S. Sorenson and Thorlief S. B. Nielsen, as the surviving partners of the firm of Crossman & Sielcken, have hereunto set our hands and affixed our seal this the 10th day of April, 1930.

EARL B. BARNES,
BRAINARD AVERY.

City, County and State of New York, ss:

Be it remembered on this 10th day of April, 1930, before me, the subscriber, a Notary Public of the County
3216 of New York, State of New York, personally appeared Earl B. Barnes and Brainard Avery, who I am satisfied are the persons named in and executing the foregoing indenture and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein set forth.

EMILIE B. BENDER,
Notary Public.

Kings Co. No. 262.
N. Y. County No. 680.
N. Y. Register's No. 2B 476.
My commission expires March 30, 1932.

Notice of Appearance. 3217

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT m. b. H., 3218

Defendants.

In Proceedings to Vacate Final Decree of December 30, 1929.

Please take notice that the undersigned appears as attorney of record for Homer S. Cummings, as Attorney-General of the United States, in behalf of the United States and as successor to the Alien Property Custodian. The undersigned was admitted to practice before the bar 3219
of this Court for the purposes of this case upon motion by David W. Wainhouse, Esq., in open Court on Tuesday, October 11th, 1938.

FRANCIS J. McNAMARA,
Special Assistant to the Attorney-General of the United States of America.
Attorney for Homer S. Cummings, Attorney-General of the U. S. on behalf of the United States and as Successor to the Alien Property Custodian.

United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

3220 **Opinion of Goddard, J.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

against

3221 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants.

E 44-28

Leonard B. Smith and Selden Bacon,
Solicitors for Irving Trust Company, as Executor of Hermann Sielcken, deceased, by Nathan L. Miller, Selden Bacon, of Counsel.
Sam E. Whitaker, Assistant Attorney-General.
3222 Lamar Hardy, United States Attorney.
Francis J. McNamara, Special Assistant to the Attorney-General.
Harry LeRoy Jones,
Frank C. Sterck,
James A. Shipper,
Attorneys, Department of Justice.
David W. Wainhouse, Assistant United States Attorney, of Counsel.

Goddard, District Judge:

This is a motion by the Attorney-General of the United States to vacate the final decree entered herein on the 30th day of December, 1929, for the plaintiffs on the ground that the court was without jurisdiction of the suit because it was not a suit cognizable under

the provisions of the Trading with the Enemy Act, and was not otherwise properly within the jurisdiction of this court.

The suit was against Howard Sutherland, then Alien Property Custodian, and Frank White, then Treasurer of the United States, in their official capacities. The Zentral Einkaufs-Gesellschaft M. B. H. (hereinafter referred to Z.E.G.), a corporation of Berlin, Germany, doing business as an official purchasing agency of the German Government, was also named as a defendant, although no relief was prayed for against it or awarded 3224
by the decree; and it appeared and filed an answer and unsuccessfully contested the debt. The suit was brought by the plaintiffs, Sorenson and Nielsen, as the surviving partners of the firm of Crossman & Sielcken, a New York partnership, in 1927, in purported pursuance of section 9(a) of the Trading with the Enemy Act (c. 106, 40 Stat. 411) as amended. The entire capital of that firm was owned by Hermann Sielcken who, up to the time of his death on October 8, 1917, had continuously resided in Germany since March, 1914. The suit sought to establish a debt owing to the firm of Crossman & Sielcken from Z.E.G. which was based upon the value of certain cargoes shipped by Crossman & Sielcken from 3225
New York to neutral consignees but destined for delivery to Z.E.G. under an agreement made between officials of the German Imperial Government, the firm of Theodor Wille of Hamburg, Germany, and Hermann Sielcken, while he was a resident of Germany, and the suit sought to have applied to the payment of the debt the sum, amounting with interest, to some $715,000, which had been seized as enemy property by the Alien Property Custodian under the Act and held by him and the Treasurer of the United States under a Trust No. 592 in the name of Z.E.G.

The suit which resulted in the decree for the plaintiffs for the sum of $716,160.37 on December 30, 1929 was tried in this court. No appeal was taken and the decree was satisfied by the Alien Property Custodian and the

3226 *Opinion of Goddard, J.*

Treasurer of the United States. A warrant for satisfaction in the amount of $727,613.93 was executed on April 10, 1930.

On May 1, 1934, pursuant to an Executive Order 6694, the office of Alien Property Custodian was abolished and the authority, rights, powers and duties conferred upon the Alien Property Custodian by law and executive order, were transferred to the Department of Justice to be administered under the supervision of the Attorney-General.

3227 Service of motion papers to vacate the decree was made on John S. Sorenson, one of the original plaintiffs herein, and upon the Chase National Bank of the City of New York as Ancillary Executor of the Estate of Thorleif S. B. Nielsen, deceased; but on June 10, 1938, after a hearing before a judge of this court on an order to show cause why an order should not be entered vacating the service on the said Bank as Ancillary Executor on the ground that it was discharged as such Ancillary Executor in 1934, the Attorney-General and the Bank agreed to a discontinuance of the proceedings as to the Chase National Bank, as Ancillary executor of the Estate of Thorleif S. B. Nielsen, deceased, and on 3228 June 15, 1938, an order was entered to that effect. Thorleif S. B. Nielsen died in September, 1930, and thereupon John S. Sorenson became the sole surviving member of the former firm of Crossman & Sielcken.

Out of the recovery in said suit, it appears that one-half was directly or indirectly paid to Z.E.G. and $100,000 to the firm of Theodor Wille.

The Government in this proceeding is not questioning the decision of the court on the merits, namely—whether a debt was or was not owing by Z.E.G. to the firm of Crossman & Sielcken. The original suit was a proceeding in rem and the Z.E.G. was not a necessary party. Koscinski v. White—286 Fed. 211, and the joinder, non-joinder, or the dissolution of Z.E.G., an enemy debtor, does not affect the jurisdiction herein. Spiegleberg v. Garvan—260 Fed. 302.

Counsel for plaintiffs contend that there was no seizure of the property of Hermann Sielcken and could not for the reason that Sielcken died on October 8, 1917 and that the Alien Property Custodian was not appointed until October 22, 1917, and that moreover, the Custodian never made any demand for Sielcken's property or his estate. Insofar as this first contention is concerned, it is firmly established law that the Alien Property Custodian might seize enemy property found within this country, even though the former owner was deceased. Miller v. Schutte—267 Fed. 604 (appeal dismissed 263 U. S. 730). 3230

The affidavits with appended documents amply support the conclusion that not only all the right, title and interest of Hermann Sielcken in the liquidation of the partnership of Crossman & Sielcken, but all the right, title and interest of the German executors and of the beneficiaries under the will of Hermann Sielcken, deceased, were seized by the Alien Property Custodian. In support of this conclusion, without discussing the details at length, it is sufficient to refer to the admissions and records of the respondent, Irving Trust Co., the successor of the Columbia Trust Co., including Sterck's affidavits, claim of George E. Warren, Vice- 3231 President of Columbia Trust Co., sworn to March 28, 1921; the sworn amendment of March 29, 1921 to claim, the receipt of April 5, 1921, signed by Warren acknowledging that the Trust Company has filed with the Alien Property Custodian * * * notice of claim against the money and property in the hands of said Custodian or the Treasurer of the United States taken as property of Herman Sielcken and/or estate of Herman Sielcken determined by said Custodian to be an enemy * * *"; also the opinion of Mr. Surrogate Foley in In Re Sielcken Estate—3 N. Y. S. 793 (2nd). The Columbia Trust Co., the corporate predecessor of the respondent, Irving Trust Co., assisted in carrying the seizure into effect under its accepted appointment as

3232 *Opinion of Goddard, J.*

agent for the Alien Property Custodian and its designation as depository for the Alien Property Custodian.

Upon seizure of the enemy alien property by the United States under the Trading with the Enemy Act, the enemy owners were divested of every right, title and interest therein. United States v. Chemical Foundation —272 U. S. 1, and it became the property of the United States. A suit for the recovery of it is a suit against the United States which may only be brought upon the consent of the United States to be sued. Henkles v.
3233 Sutherland—271 U. S. 298. Section 7(c) of the Act authorized the seizure of all money or other property held for or by enemies or allies of enemies and provided as follows:

"* * * and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act."

Section 9 of the Act is the only statutory authority for suits to recover such property, and the pertinent part of it provides:

"Sec. 9(a). That any person not an enemy or ally of
3234 enemy * * * to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; * * * if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the District Court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as

the case may be, shall be made a party defendant), to establish the interest, right, title or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *"

A plaintiff whose property was thus seized could not invoke the general equity jurisdiction of the court. His remedy is that provided in Section 9, which is ex- 3236
clusive. Crone v. Sutherland—63 Fed. (2nd) 895 (Court of Appeals, District of Columbia; Sutherland v. Norris—24 Fed. (2nd) 414 (C. C. A. 3).

After the termination of the state of war (July 2, 1921) the Congress made available certain remedies to a restricted class enabling them to proceed for the return of their seized property. Section 9 of the Act was amended in 1923 (Act of March 4, 1923, 42 Stat. 1511) and in 1928 (Act of March 10, 1928, 45 Stat. 254) the procedural remedies extended to enemies under section 9 were always limited by the Congress to those persons who were "the owner" of the property "at the time such 3237
money or other property" was seized by the Alien Property Custodian. Although section 9 was amended so as to allow the bringing of suits by various classes of enemy claimants, the remedy provided for those seeking to establish a debt as in the case at bar, has at all times since the Act remained expressly limited "to any person not an enemy alien or ally of an alien." Section 9 granting consent to sue excludes as a debt claimant any one defined in section 2 of the Act as an "enemy" and this section 2(a) reads as follows:

"Any individual, partnership, or other body of individuals, or any nationality, resident within the territory * * * of any nation with which the United States is at war * * *."

3238 *Opinion of Goddard, J.*

Hermann Sielcken, the principal partner and owner of the entire capital of the firm of Crossman & Sielcken. was included within the term "enemy." The allegation in the bill of complaint—and the only one respecting the non-enemy status of the plaintiffs, is

"SECOND: Said partnership of Crossman & Sielcken at all times has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, and has been and is a resident of said Borough of Manhattan, City and State of New
3239 York, and has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as and herein referred to as the Trading with the Enemy Act, or in any act amendatory thereof and supplemental thereto or in any proclamation or executive order issued by the President of the United States pursuant to subsection (c) of section 2 of the Trading with the Enemy Act."

3240 It is true that for some purposes a partnership is treated as an "entity"; but a partnership is not a juristic entity. Rossmore v. Commissioner—76 Fed. (2nd) 520 (C. C. A. 2) and it is fully established that, when citizenship is a necessary jurisdictional allegation in a suit by or against a partnership, this court must consider the diverse citizenship of the several persons composing the partnership or association. Great Southern Hotel v. Jones—177 U. S. 449. The rule applies to the Trading with the Enemy Act in which non-enemy status of the individual partner is a jurisdictional condition precedent to the filing of a debt claim and the institution of a suit upon such claim. Froelich & Kuttner v. Sutherland—22 Fed. (2nd) 870 (Court of Appeals, District of Columbia); Waldes v. Basch—179 N. Y. S. 713.

Accordingly it is clear that under section 9 of the Act, it is the residence of the partners who composed the firm of Crossman & Sielcken which determines whether jurisdiction was conferred upon this court. The fact that the partnership was organized and that it carried on its business in the United States is, of course, immaterial, for if these, and not the residence of the partners, were the controlling factors the purpose of the Act would be readily evaded. The general rule is that it is essential that the right of the plaintiff to institute an action and the jurisdiction of the court shall 3242
appear on the face of the bill by positive averment, applies to suits under section 9 of the Trading with the Enemy Act. Garvin v. Kogler—272 Fed. 442 (C. C. A. 3).

Section 7 (c) of the Trading with the Enemy Act provides that—

"The sole relief and remedy of any person having any claim to any money or other property * * * conveyed * * * to the Alien Property Custodian * * * shall be that provided by the terms of this act * * *."

For a plaintiff to be entitled to the relief and remedy under section 9, it must appear that the debt claimant 3243
be "not an enemy" and that a debt is owing to such claimant from an enemy whose property has been seized; also section 9(e) that the debt was owing to and owned by the claimant prior to October 6, 1917. The co-partnership agreement of the partnership of Crossman & Sielcken provides—

"FIFTH: The capital of the partnership shall consist of all the property and assets of every kind and description belonging to the said Hermann Sielcken, as surviving partner of the late firm of Crossman & Sielcken, or such part thereof as may be used in the business of the partnership now formed, including the goodwill of said firm. The whole of the said capital shall continue to be the property of the said party of the first part, and upon the termination of the partnership

3244 *Opinion of Goddard, J.*

from whatever cause, the same shall belong entirely and absolutely, to the party of the first part or to his estate. The parties of the second and third parts shall have no share or title in or to any of the said capital, their only interest in the business consisting of their shares of the net profits that may be realized therefrom."

Upon the declaration of war on April 6, 1917 the partnership of Crossman & Sielcken was dissolved by operation of law. Sutherland v. Mayer—271 U. S. 284. Hermann Sielcken, the owner of the entire capital of the firm
3245 of Crossman & Sielcken, was and had been for several years prior to his death on October 8, 1917, an enemy alien under section 2(a) of the Act.

Another article of the co-partnership provided:

"ELEVENTH: Upon the death of the party of the first part, it shall be the duty of the surviving partners to transfer and pay over to the executor of the will of the deceased partner his capital as above defined and also all the property and business of the firm."

Accordingly, prior to October 8, 1917, when Hermann Sielcken died, Sorenson and Nielsen owned but "an interest in the business consisting of their shares of the
3246 net profits that may be realized therefrom" and that all the capital, property and business, including as an asset the debt sued upon belonged "entirely and absolutely" to Hermann Sielcken during his lifetime and to his estate upon his death.

The plaintiffs brought the suit allegedly under Section 61 of the Partnership Law of New York, which provides that a partnership is not terminated by dissolution, but continues until its affairs are wound up. But Section 68 of the Partnership Law states that the surviving partners have the right to wind up the affairs of the partnership *only* if it be *not* "otherwise agreed." In this co-partnership agreement it was "otherwise agreed"; and under the express terms of Hermann Sielcken's will, the sole right to liquidate the partnership assets and the property of the firm of Crossman & Sielcken was

after his death vested in the executor appointed in his will.

A judgment entered in the Supreme Court for the County of New York on November 11, 1933, upon the Referee's Report submitted in the case of Chase National Bank of the City of New York, as Ancillary Executor of the Last Will and Testament of T. S. B. Nielsen v. John S. Sorenson, Irving Trust Co., as Executor of the Last Will and Testament of Hermann Sielcken, deceased, *et al.*, read:

"Now, on motion of Avery & Whiting, attorneys for 3248
the said defendant, Clara Sielcken-Schwarz, it is

ADJUDGED that upon the death of said Hermann Sielcken on October 8, 1917, by virtue of the terms of a certain partnership agreement dated June 2nd, 1913 (a copy of which is attached to the complaint herein) between said Sielcken and said John S. Sorenson and said Thorleif S. B. Neilsen and by virtue of the terms of said Sielcken's will dated March 23rd, 1914, and admitted to probate by the Surrogates' Court of the County of New York on the 26th day of January, 1918, the sole right to liquidate the partnership assets and property of the firm of Crossman & Sielcken was vested in the 3249
executor named in said will, now said defendant Irving Trust Company, and under the terms of said instruments no other person was lawfully entitled to be such liquidator. It is further

ADJUDGED that neither the plaintiff's testator, Thorleif S. B. Nielsen nor said defendant John S. Sorenson, is now or at any time since the dissolution of said firm of Crossman & Sielcken by the said death of said Hermann Sielcken on October 8th, 1917, has been a liquidating partner thereof."

On November 8, 1937, the Supreme Court of New York County entered a final judgment in said case.

Respondent contends that "even if the articles (copartnership agreement) were to be construed as transferring the partnership receivables to the executor so

that it alone could properly maintain suit on claims due the partnership in the absence of further agreement, there was in this case, just such an agreement made between the executor and Sorenson and Nielsen. Such an agreement was made by the letter from the executor of June 14, 1918, to the two surviving partners and their acceptance of it, and action under it." However, not only is it apparent from this letter that it was recognized by the surviving partners and Sielcken's executor that the co-partnership agreement vested Sielcken's executor the sole right to bring suit on claims due the
3251 partnership, but moreover, the purported transfer and assignment of that right for the purposes of this suit was void under the Trading with the Enemy Act, Sections 7(b) and 9(b); Schrijver v. Sutherland, 19 Fed. (2nd) 688 (Court of Appeals, District of Columbia).

It further appears that whatever interest the plaintiffs were entitled to in accordance with the co-partnership agreement was paid to them out of the surplus funds of the partnership, as is evidenced by the settlement entered into by the firm of Crossman & Sielcken in liquidation with each of the plaintiffs on December 23, 1917, and the releases executed by both plaintiffs releasing the firm of Crossman & Sielcken, its successors
3252 and assigns, and the members thereof, their heirs and executors from all claims and causes of action. This release included any interest in the debt which the plaintiffs sued upon, for it stated:

"In consideration of the receipt of the aforementioned payment, I hereby agree that, should any amount be awarded to me, individually, by any Prize Court or otherwise, on account of goods shipped during the year 1915 and seized by the British Naval Authorities, I will pay all such amounts forthwith to the Columbia Trust Co., as Executors of the Estate of Hermann Sielcken, deceased."

Therefore, it is clear that the plaintiffs neither prior nor subsequent to the death of Hermann Sielcken, were

the owners of the debt claimed within the terms of the Act, and had no standing to invoke the jurisdiction of this court in this suit brought by them, either as individuals or as the alleged surviving partners of the firm of Crossman & Sielcken.

In my judgment the allegation in the bill, paragraph "Second" as to non-enemy status did not state facts sufficient to confer jurisdiction on this court.

In September, 1917, Sorenson and Nielsen proceeded to liquidate the partnership pursuant to the requirements of the United States War Trade Board. On November 16, 1917, the War Trade Board required them 3254
to turn over to the Alien Property Custodian the share of the enemy partner, Hermann Sielcken, in the proceeds of the firm. All the assets of the firm of Crossman & Sielcken were turned over to the Columbia Trust Co. as agent for the Alien Property Custodian by Sorenson and Nielsen. Thereupon, the Alien Property Custodian acquired all of the assets of the firm of Crossman & Sielcken, including this and all other choses in action and the plaintiffs were divested of every right, if they had any, in respect to the property so taken and held under the Act. Woodson v. Deutsche, etc., 292 U. S. 449. While the plaintiffs could not base any claim to 3255
the property so seized upon a retained right of ownership in or control over a chose in action or the property seized, they might have filed a claim solely upon a right arising out of the terms of the Act itself if the right existed, for the return to them of this or any other asset seized by the Alien Property Custodian as belonging to the firm of Crossman & Sielcken, or to the estate of Hermann Sielcken. They filed no such claim nor was the asset in question ever returned to them by the Alien Property Custodian.

The Government contends that even if it be assumed that the allegation in the bill to the effect that the partnership was not an enemy, without alleging the non-enemy status of the partners, was sufficient to confer jurisdiction, which it denies, the suit was collusively brought in the names of the plaintiffs for the purpose of

3256 *Opinion of Goddard, J.*

creating a suit cognizable under the Act and that such suit is not within the jurisdiction of this court.

The Attorney-General on April 4, 1921, allowed a claim filed by the Columbia Trust Co., as Executor of the Estate of Hermann Sielcken, deceased, and ordered the release to the Executor in purported pursuance of Section 9 of the Act of all right and interest of the Alien Property Custodian in the interest of Hermann Sielcken in the liquidation of the partnership of Crossman & Sielcken and in the Estate of Crossman & Sielcken and in the Estate of Hermann Sielcken, deceased. There-
3257 upon, and as a result of this return of all the seized assets, the Executor became vested with the right if a proper claimant under Section 9 and if the sole owner of the debt to file a claim on behalf of the firm of Crossman & Sielcken in liquidation; also on behalf of the Hermann Sielcken Estate for the recovery of the debt here concerned and to bring suit upon that claim to establish it under the Act, if possible. Section 9(d) confers upon an executor the same rights which the deceased, if living, would have been entitled to exercise under the Act, but no greater rights. The rights of the executor therefor were limited to those which Hermann Siel-
3258 cken, if living, would have been entitled to exercise. But a debt claim could be filed under Section 9 only by a person "not an enemy," so that the Sielcken Executor, although a party owner of the debt, was not qualified to be a claimant. Miller v. Schutte, 287 Fed. 604, appeal dismissed, 263 U. S. 730; Garvin v. Kogler, 272 Fed. 442.

The debt sued upon was founded upon shipments of merchandise by the firm of Crossman & Sielcken together with Theodor Wille of Hamburg, Germany, an enemy firm, pursuant to an agreement that the merchandise should belong in undivided shares to Crossman & Sielcken and the firm of Theodor Wille. The adventure, consisting of the purchase, shipment and sale of the merchandise abroad was for their joint account. That suit was brought upon the claim for the entire amount by American citizens does not cure the defect in view of the fact

of the joint one-half ownership in it by the enemy firm of Theodor Wille. And the plaintiffs could not file the claim as Wille's assignee for this was prohibited under Sections 7(b) and 9(b) of the Act.

The Government contends that the plaintiffs, notwithstanding they knew that Wille, an enemy had a one-half interest in the claim upon which the suit was based, stated under oath that the claim was not filed in collusion with an enemy, thus filed a claim which they were not legally entitled to make and one not cognizable under the Act. On the other hand, the Irving Trust Co., as Executor of Hermann Sielcken, deceased, contends that 3260
all claims of Theodor Wille to any interest in any recovery in the suit had been released prior to 1924 by a settlement made by Clara Sielcken Schwarz (widow and residuary legatee of Hermann Sielcken) with the firm of Theodor Wille and the consequent charging off of such claim to profit and loss on the books of Crossman & Sielcken. From this it would appear that Theodor Wille retained his interest in the cargoes from October 6, 1917, until sometime in 1924, and from that time on the chose in action was owned entirely by the Irving Trust Co., as Executor of Hermann Sielcken, which nominated Sorenson & Nielsen to file a debt claim and to bring the suit as 3261
surviving partners and sole owners of the debt claim. But Theodor Wille was an enemy and so could neither legally file a claim nor bring suit as a debt claimant, and the Irving Trust Co., as Executor of Sielcken, or Sorenson & Nielsen, as assignees of Wille's claim were in no better position than Wille himself.

The Government urges that the reason why suit to establish the claimed debt was brought in the name of the plaintiffs instead of the true owners and why the actual ownership of the debt was not disclosed and asserted, and the reason why the suit was brought by parties plaintiff collusively, as the Government charges, was because the Act provided no remedy for the payment of a debt claim to the Executor of Hermann Sielcken, an enemy, and that as the debt sued upon was owned jointly by an enemy, firm and the Executor of an enemy,

the Act precluded the administrative allowance or the judicial determination of a claim so owned. To support this contention the Government refers to the following testimony of Brainard S. Avery, attorney of record for the plaintiffs in the suit:

"Q. Whose idea was it to bring the suit in the District Court in the names of Sorenson & Nielsen without mentioning the executor or joining the executor as a party? A. I think it was mine.

"Q. What reason had you for proceeding in that way?
A. I wanted to make the suit stick.
3263 "Q. What had the omission of the executor from that suit to do with that matter?

• • • • • •

"Q. In your judgment? A. At that time, all of 1927, I knew that Mr. Sielcken had died in an enemy country, that under the Trading with the Enemy Act he had an enemy status, that Mr. Sorenson and Mr. Nielsen had no such obstacles to overcome, the executor not being in any better position than Mr. Sielcken himself. • • •

"Q. At the time you prepared that bill, you were familiar, were you not, both with the articles of co-partnership and the will? A. The bill was prepared in the
3264 first instance by Mr. Barnes, but we were both familiar with the papers."

The testimony given by the attorney of record for the plaintiffs, Brainard Avery, in Matter of Sielcken, 162 Misc. 54, is also referred to and his statement: "• • • agreement was that right straight through there should be an even division, even extending to the moneys in possession of the Alien Property Custodian" and the estate "was to take one-half and the Germans were to get the other half, or to be released from the other half • • •" (p. 1662, Avery testimony, Ex. T. Sterck, aff.).

It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate,

although nominally between the plaintiffs, as alleged non-enemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of "creating a case cognizable" under the Trading with the Enemy Act. A situation comparable with that is the case of Cashman v. Amador, etc., Canal Co., 118 U. S. 58, in which the Court said:

3266

"* * * the name of Cashman was used with his consent, because the county could not sue in its own name in the Circuit Court of the United States. The recital shows in express terms that the suit was brought for the benefit of the county, because it desired to restrain the miners in the bed of the river, and it could not sue therefore in its own name in the courts of the United States. * * * From the very beginning the suit was and is in reality the suit of the county, with a party plaintiff 'collusively made,' 'for the purpose of creating a case cognizable' by the Circuit Court of the United States under the act of March 3, 1875. While, therefore, the 'dispute or controversy' 3267 'involved' is nominally between Cashman, an alien, and the defendants, citizens of California, it is 'really and substantially' between one of the counties of California and citizens of that State, and thus not 'properly within the jurisdiction' of the Circuit Court."

See also Lehigh Mining & Mfg. Co. v. Kelly, 160 U. S. 327; Farmington v. Pillsbury, 114 U. S. 138; Williams v. Nottaws, 104 U. S. 209; Hawes v. Oakland, 104 U. S. 450.

The actual owners of the claim were not entitled to bring suit under the Act, nor were the nominal plaintiffs in a position to sue upon this claim under the Act.

It is quite true no objection as to jurisdiction was made by counsel for the Government upon the trial,

but this could not confer jurisdiction in the face of the express limitations of Section 9 of the Trading with the Enemy Act. Banco Mexicano v. Deutsche Bank, 263 U. S. 591; Cummings v. Isenberg, 89 Fed. (2nd) 489, cert. denied 301 U. S. 682. And consent of the parties may not cure a defect in jurisdiction in violation of the Judiciary Act. Chicago, Burlington & Quincy Ry. Co. v. Willard, 220 U. S. 413; Mansfield, Coldwater & Lake Michigan Railway Co. v. Swan, 111 U. S. 379. The question of jurisdiction over the parties or the subject-matter was not raised at the trial
3269 of the case at bar.

This is not an instance of the erroneous or irregular exercise of jurisdiction where the decree might be voidable. It is an instance where the special statute in which the Government has consented to be sued and under which the suit is purported to be brought, definitely limits the jurisdiction of the court to a certain class of litigants. Jurisdiction beyond that class is not conferred on the court and it had no jurisdiction of the case at bar.

Although the general rule is that a final decree or judgment may not be vacated after the expiration of
3270 the term of the court which rendered it, there is an exception to this rule where it appears that the decree was void for want of jurisdiction. United States v. Ickes, 84 Fed. (2nd) 257 (Court of Appeals, District of Columbia); Clark v. Arizona Mutual Savings & Loan Assoc., 217 Fed. 640; Woods Bros. Const. Co. v. Yankton County, 54 Fed. (2nd) 304 (C. C. A. 8); see also Standard Oil Co. v. Missouri, 224 U. S. 270, at p. 281; Windsor v. McVeigh, 93 U. S. 274, at p. 282; Reynolds v. Stockton, 140 U. S. 254, at p. 268.

In the case at bar the bill did not allege a case within the jurisdiction of this Court; it was not an instance where the court was called upon or did determine the truth of an allegation respecting jurisdiction as in Denver First National Bank v. Klug, 186 U. S. 202, cited by counsel for respondent. It was a sim-

ilar situation to that in Vallely, etc., v. Northern Fire & Marine Ins. Co., 254 U. S. 348. The want of jurisdiction was apparent on the face of the bill, and since this court had no jurisdiction over the "rem" or over the parties, the decree was void—not merely voidable. Experts Rowland, 104 U. S. 604; Phebus v. Search, 264 Fed. 407 (C. C. A. 8); United States v. Turner, 47 Fed. (2nd) 86 (C. C. A. 8). A decree that is void because rendered without jurisdiction may be vacated upon motion during the term in which the decree is rendered, or afterwards. United States v. Turner (*supra*); United States v. Ickes (*supra*); City of Stuart v. Green, 91 Fed. (2nd) 603, cert. denied 302 U. S. 744. 3272

The Government refers to Rule 6(c) of the Rules of Civil Procedure which provides that "the expiration of a term of court in no way effects the power of a court to do any act or take any proceeding in a civil action which has been pending before it"; but this Rule is not applicable to the case at bar in view of the fact that the decree in question was entered in 1929 and that this proceeding was brought last May—long before the New Rules came into effect.

The Government also contends that the court lacked jurisdiction of the original suit because it was brought in the Southern District of New York instead of the Eastern District of New York, where the plaintiff, Sorenson, resided, or New Jersey, where Nielsen resided, or the District of Columbia, in accordance with Section 9(a) of the Act, in view of the fact that a partnership, unlike a corporation, is not given the right to institute a suit "where it has its principal place of business." However, as the motion is disposed of on the grounds discussed above, it is unnecessary to consider this contention. 3273

The respondent seems to question the right of the Attorney-General of the United States to make this motion. But the Attorney-General is the representative of the United States in its litigation, and moreover, the

3274 *Opinion of Goddard, J.*

Attorney-General has since July 1, 1934, when the Alien Property Custodian ceased to exist, become the successor in interest to the Alien Property Custodian. The Government is, of course, interested in the loss of funds which otherwise would have been available for the satisfaction of awards by the Mixed Claims Commissions to American citizens.

I think that the original suit was not properly within the jurisdiction of this court, and the decree entered therein is void. Accordingly, the motion to vacate the
3275 decree is granted.

January 30, 1939.

HENRY W. GODDARD,
U. S. D. J.

3276

Order. 3277

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian; FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,

Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Equity No. 44-28. 3278

3279

A motion having been made by Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for Honorable Frank Murphy, Attorney-General of the United States and as successor to the Alien Property Custodian, in behalf of the United State of America (by Francis J. McNamara and David W. Wainhouse, Esqs., of counsel) for an order substituting the Honorable Frank Murphy, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of

3280 *Order*

America in lieu of the Honorable Homer S. Cummings, as Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America, now resigned, and Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America (Francis J. McNamara and David W. Wainhouse, Esqs., of counsel) having appeared in support of the motion, and Leonard B. Smith
3281 and Selden Bacon, Esqs., attorneys for Irving Trust Company, as executor of Hermann Sielcken, deceased (Selden Bacon, Esq., of counsel), having appeared in opposition thereto,

Now, upon reading and filing the notice of such motion and the affidavit of David W. Wainhouse thereto annexed, verified the 10th day of February, 1939, and the replying affidavit of Frank C. Stercke, verified the first day of March, 1939, in support of this motion, and the affidavits of Selden Bacon verified respectively the 20th day of February, 1939, and the 3rd day of March, 1939, in opposition thereto, and upon all the files
3282 and proceedings herein, and after hearing counsel in support of and in opposition to such motion and due consideration having been had, and on motion of Gregory F. Noonan, Esq., United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States and successor to the Alien Property Custodian in behalf of the United States of America, it is

Ordered, Adjudged and Decreed that the motion of Gregory F. Noonan, United States Attorney for the Southern District of New York, attorney for the Honorable Frank Murphy, Attorney-General of the United States, as successor to the Alien Property Custodian, in behalf of the United States of America, be and it is hereby granted, and it is further

Order

3283

Ordered, Adjudged and Decreed that the Honorable Frank Murphy, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America be and hereby is substituted in lieu of the Honorable Homer S. Cummings, as Attorney-General of the United States and as successor to the Alien Property Custodian in behalf of the United States of America.

Dated, New York, March 9, 1939.

(Signed) HENRY W. GODDARD.

3284

3285

3286 **Notice of Settlement of Proposed Order From John T. Cahill, United States Attorney for the Southern District of New York.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

3287 v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m.b.H.,
Defendants,

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken,
Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Notice of Settlement. Equity No. 44-28.

3288

Sirs:

Please Take Notice that the within order will be presented for settlement and signature to the Honorable Henry W. Goddard, United States District Judge, at the office of the Clerk in the United States Court House, Foley Square, Borough of Manhattan, City of New

Notice of Settlement of Proposed Order from John T. Cahill, United States Attorney for the Southern District of New York. 3289

York, on the date to be set by the Honorable Henry W. Goddard upon five days' notice to the attorneys.

Dated, New York, New York, March 11, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney, Southern District of New York, Attorney for United States, 3290
Office & P. O. Address,
United States Court House, Foley Square,
Borough of Manhattan,
City of New York.

To:

Leonard B. Smith and Selden Bacon, Esqs.,
Attorneys for Irving Trust Company, as
Executor of Hermann Sielcken, deceased,
15 Broad Street,
New York, N. Y.

Garfield, Wrubel & Lazarus, Esqs.,
Attorneys for John S. Sorenson,
25 West 44th Street, 3291
New York, N. Y.

3292 **Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian.**

At a Stated Term of the United States District Court, held in and for the Southern District of New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the.....day of March, 1939.

Present: Honorable Henry W. Goddard,
United States District Judge.

3293

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,
Defendants,

3294 IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,
Intervenor.

In proceeding to vacate final decree of December 30, 1929.

Order.
Equity No. 44-28.

Francis J. McNamara, Special Assistant to the Attorney General of the United States, attorney of record for Frank Murphy, as Attorney General of the United States, on behalf of the United States and as successor to the Alien Property Custodian, having moved this Court for an order vacating the final decree entered in this cause on the 30th day of December, 1929, and for such other and further relief as this Court may deem just and proper in the premises, and said motion having been argued before this Court,

Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian 3295

Now, on reading and filing the affidavit of Frank C. Sterck, an attorney in the Department of Justice, verified the 18th day of May, 1938, and exhibits annexed thereto, the reply affidavit of Frank C. Sterck, verified the 15th day of September, 1938, and exhibits annexed thereto, and supplementary affidavit of Frank C. Sterck, verified the 10th day of October, 1938, with exhibits annexed thereto and second supplementary affidavit of Frank C. Sterck, verified the 25th day of October, 1938, with exhibits annexed thereto, all in support of the motion; 3296

The Chase National Bank of the City of New York, as ancillary executor of the Estate of Thorleif S. B. Nielsen, appearing specially by Chadbourne, Wallace, Park & Whiteside, Esqs. (Leonard P. Moore, Esq., of counsel), and having moved the Court by an order to show cause why an order should not be made and entered vacating, setting aside, cancelling and annulling service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, on the Chase National Bank of the City of New York as ancillary administrator of the estate of Thorlief S. B. Nielsen, deceased, and the Court on the 15th day of June, 1938, 3297 having signed an order directing that the service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, to vacate the final decree entered in this cause on the 30th day of December, 1929, served upon the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorleif S. B. Nielsen, be vacated, annulled and declared to be of no effect;

John S. Sorenson having appeared by Garfield, Wrubel & Lazarus, Esqs., and having filed an affidavit verified the 18th day of June, 1938;

And the Irving Trust Company as executor of Hermann Sielcken, deceased, on its motion having been granted leave of Court by order of the 28th day of June, 1938, to intervene as a party in the above proceeding to vacate the decree of this Court of December 30, 1929, and having appeared by Leonard B. Smith

3298 *Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian*

and Selden Bacon, Esqs., and having filed the answering affidavit of Brainard Avery, verified the 11th day of August, 1938, with exhibits attached thereto, the affidavit of Richard S. Doyle, verified the 11th day of August, 1938, the affidavit of Charles D. Hamel, verified the 12th day of August, 1938, the affidavit of Frederick Wirth, Jr., verified the 29th day of July, 1938, the affidavit of Leonard B. Smith, verified the 11th day of
3299 August, 1938, the affidavit of William Abramson, verified the 5th day of August, 1938, the affidavit of George O. Castell, verified the 25th day of July, 1938, the affidavit of George E. Warren, verified the 28th day of June, 1938, with exhibits attached thereto, the affidavit of John F. McIlwain, verified the 12th day of August, 1938, the affidavit of Orrin R. Judd, verified the 30th day of July, 1938, the affidavit of Selden Bacon, verified the 12th day of August, 1938, with exhibit attached thereto, the rebutting affidavit of George E. Warren, verified the 23rd day of September, 1938, the rebutting affidavit of Brainard Avery, verified the 22nd day of September, 1938, the rebutting affidavit of Selden Bacon,
3300 verified the 23rd day of September, 1938, and exhibits attached thereto, the rebutting affidavit of George W. Alger, verified the 7th day of September, 1938, and the affidavit of Brainard Avery, verified the 20th day of October, 1938, with exhibit attached thereto, in reply to supplemental affidavit of Frank C. Sterck, the affidavit of Selden Bacon, verified the 18th day of October, 1938, in reply to supplemental affidavit of Frank C. Sterck, all in opposition to said motion.

Upon filing the opinion of the Court and on motion of Francis J. McNamara, Special Assistant to the Attorney General, attorney of record for Frank Murphy, as Attorney General of the United States, on behalf of the United States and as successor to the Alien Property Custodian, it is hereby

Ordered, Adjudged and Decreed, that the motion to vacate the final decree entered in this cause on the 30th

Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian 3301

day of December, 1929, be and the same is hereby granted, and it is further

Ordered, Adjudged and Decreed that the final decree entered in this cause on the 30th day of December, 1929, be and the same is hereby vacated, annulled, set aside and declared to be void and of no effect whatsoever, and it is further

Ordered, Adjudged and Decreed that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, were collusively 3302 made parties plaintiff for the purpose of creating a cause cognizable under the Trading with the Enemy Act, and it is further

Ordered, Adjudged and Decreed that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman and Sielcken, were nominal party plaintiffs in the instant suit and retained none of the moneys paid them by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree of this Court, entered on the 30th day of December, 1929, and 3303 it is further

Ordered, Adjudged and Decreed that the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, was the real party in interest in the instant suit and that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, handed over to the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, all of the moneys and property paid by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree entered in this Court on the 30th day of December, 1929, and it is further

Ordered, Adjudged and Decreed that Frank Murphy, as Attorney General of the United States in behalf of the

3304 *Form of Order Proposed by Honorable Frank Murphy, as Attorney-General and as Successor to the Alien Property Custodian*

United States, and as successor to the Alien Property Custodian, do have and recover of and from the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, Intervenor, the sum of $727,618.93, with interest thereon at six per cent from April 10, 1930, to the date of payment of this judgment, together with the costs of this action to be taxed, and that said Irving Trust Company, as executor of Hermann
3305 Sielcken, deceased, Intervenor, pay said sums to said Frank Murphy, as Attorney General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, within twenty days, in default of which payment said Frank Murphy, as Attorney General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, shall have execution therefor, and it is further

Ordered, Adjudged and Decreed that the bill of complaint herein be and hereby is dismissed for want of jurisdiction.

3306 Dated, New York, N. Y., March , 1939.

.....

U. S. D. J.

Order Vacating Final Decree of December 30, 1929. 3307

At a Stated Term of the United States District Court held in and for the Southern District of New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 28 day of April, 1939.

Present: Honorable Henry W. Goddard,
United States District Judge.

JOHN S. SORENSON and THORLIEF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Seilcken, Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H., Defendants.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased, Intervenor.

3308

Order.

Equity No. 44-28.

3309

Lamar Hardy, United States Attorney for the Southern District of New York, as attorney for the United States, having on notice of motion, dated May 18th, 1938, moved this court "for an order vacating the final decree entered in this cause on the 30th day of December, 1929, on the ground that said final decree is void because this Court was without jurisdiction to enter the same"; and said motion having been argued before this Court,

Now, on reading and filing the affidavit of Frank C. Sterck, an attorney in the Department of Justice, verified

the 18th day of May, 1938, and exhibits annexed thereto, the reply affidavit of Frank C. Sterck, verified the 15th day of September, 1938, and exhibits annexed thereto, and supplementary affidavit of Frank C. Sterck, verified the 10th day of October, 1938, with exhibits annexed thereto and second supplementary affidavit of Frank C. Sterck, verified the 25th day of October, 1938, with exhibits annexed thereto, all in support of the motion;

The Chase National Bank of the City of New York, as ancillary executor of the Estate of Thorleif S. B.
3311 Nielsen, appearing specially by Chadbourne, Wallace, Park & Whiteside, Esqs. (Leonard P. Moore, Esq., of counsel), and having moved the Court by an order to show cause why an order should not be made and entered vacating, setting side, cancelling and annulling service of the notice of motion, affidavit of Frank C. Sterck with exhibits attached thereto, on the Chase National Bank of the City of New York as ancillary administrator of the estate of Thorlief S. B. Nielsen, deceased, and the Court on the 15th day of June, 1938, having signed an order directing that the service of the notice of motion, affidavit of Frank C. Sterck with exhibits
3312 attached thereto, to vacate the final decree entered in this cause on the 30th day of December, 1929, served upon the Chase National Bank of the City of New York, as ancillary executor of the estate of Thorlief S. B. Nielsen, be vacated, annulled and declared to be of no effect;

John S. Sorenson having appeared by Garfield, Wrubel & Lazarus, Esqs., and having filed an affidavit, verified the 18th day of June, 1938;

And the Irving Trust Company, as executor of Hermann Sielcken, deceased, on its motion having been granted leave of Court by order of the 28th day of June, 1938, to intervene in the above proceeding to vacate the decree of this Court of December 30, 1929, as one having acquired an interest under the decree subsequent thereto, and having so appeared by Leonard B. Smith and Selden

Bacon, Esqs., and having filed the answering affidavit of Brainard Avery, verified the 11th day of August, 1938, with exhibits attached thereto, the affidavit of Richard S. Doyle, verified the 11th day of August, 1938, the affidavit of Charles D. Hamel, verified the 12th day of August, 1938, the affidavit of Frederick Wirth, Jr., verified the 29th day of July, 1938, the affidavit of Leonard B. Smith, verified the 11th day of August, 1938, the affidavit of William Abramson, verified the 5th day of August, 1938, the affidavit of George O. Castell, verified the 25th day of July, 1938, the affidavit of George E. 3314
Warren, verified the 28th day of June, 1938, with exhibits attached thereto, the affidavit of John F. McIlwain, verified the 12th day of August, 1938, the affidavit of Orrin R. Judd, verified the 30th day of July, 1938, the affidavit of Selden Bacon, verified the 12th day of August, 1938, with exhibit attached thereto, the rebutting affidavit of George E. Warren, verified the 23rd day of September, 1938, the rebutting affidavit of Brainard Avery, verified the 22nd day of September, 1938, the rebutting affidavit of Selden Bacon, verified the 23rd day of September, 1938, and exhibits attached thereto, the rebutting affidavit of George W. Alger, verified the 7th day of September, 1938, and the affidavit of Brainard 3315
Avery, verified the 20th day of October, 1938, with exhibit attached thereto, in reply to supplemental affidavit of Frank C. Sterck, the affidavit of Selden Bacon, verified the 18th day of October, 1938, in reply to supplemental affidavit of Frank C. Sterck; and also upon the original bill filed herein by Sorenson and Nielsen, the answer to that bill by the Alien Property Custodian and the United States Treasurer, and the answer to that bill of the Zentral Einkaufs Gesselschaft m. b. H. and the decree of December 30, 1929, entered in this Court in opposition to the said motion; and this Court having, by its order of March 9, 1939, substituted Honorable Frank Murphy as Attorney-General of the United States and successor to the Alien Property Custodian for Honorable Homer S. Cummings, his predecessor in office;

3316 *Order Vacating Final Decree of December 30, 1929*

Now, upon all of the above-mentioned papers, and upon filing the opinion of this Court, and after hearing Francis J. McNamara, Esq., Special Assistant to the Attorney-General, on behalf of the Attorney-General and of the United States, in support of said motion, and Honorable Nathan L. Miller and Selden Bacon, Esq., in opposition thereto; and due consideration having been had,

It is hereby

Ordered, Adjudged and Decreed that the said motion
3317 to vacate the final decree entered in this cause on the 30th day of December, 1929, be, and the same is hereby granted; and it is further

Ordered, Adjudged and Decreed that the said final decree entered in this cause on the 30th day of December, 1929, be, and the same is, hereby vacated, annulled, set aside and declared to be void and of no effect whatsoever because this Court was without jurisdiction to enter the same.

HENRY W. GODDARD,
U. S. D. J.

3318

Notice of Appeal by Irving Trust Company. 3319

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,
Plaintiffs,

v.

HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m.b.H.,
Defendants, 3320

In proceeding to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken,
Intervenor.

Equity No. 44-28.

Sirs:

Please Take Notice That: 3321

The Irving Trust Company as Executor of Hermann Sielcken, deceased, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree of the above-named District Court, signed by Hon. Henry W. Goddard, District Judge, dated and entered on the 28th day of April, 1939, in the office of the Clerk of the United States District Court for the Southern District of New York, in the above entitled proceeding to vacate, vacating and setting aside the decree of said United States District Court for the Southern District of New York in the original suit above entitled, of date the 30th day of December, 1929; and

3322 *Notice of Appeal by Irving Trust Company*

from each and every part of said order and decree of April 28th, 1939.

Dated, New York, May 12th, 1939.

Yours respectfully,

LEONARD B. SMITH and SELDEN BACON,
Solicitors for the Irving Trust Company
as Executor of Hermann Sielcken, Deceased,
Office & Post Office Address,
3323 15 Broad Street,
Borough of Manhattan,
New York City, N. Y.

To:
Charles Weiser, Esq.,
Clerk of the United States District Court,
for the Southern District of New York.
And to:
John T. Cahill, Esq.,
United States District Attorney for the
Southern District of New York,
Solicitor for the United States,
United States Court House,
3324 Foley Square, New York City.
Francis J. McNamara, Esq.,
Solicitor for Hon. Frank Murphy, as Attorney General of the United States,
United States Court House,
Foley Square, New York City.
Garfield, Wrubel & Lazarus, Esqs.,
Solicitors for John S. Sorenson,
25 West 44th Street,
New York City.

(Filed with bond for costs on appeal on May 13th, 1939 in the office of the Clerk of the United States District Court for the Southern District of New York.)

Notice of Cross Appeal. 3325

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

HOWARD SUTHERLAND as Alien Property Custodian, FRANK WHITE as Treasurer of the United States, and ZENTRAL EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

In proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the Estate of Hermann Sielcken, deceased,

Intervenor.

3326

Equity No. 44-28

Sirs: 3327

Please Take Notice that Frank Murphy, as Attorney General of the United States, and as successor to the Alien Property Custodian, on behalf of the United States of America, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from the order and decree of the above-named District Court, signed by the Honorable Henry W. Goddard United States District Judge, in the Office of the Clerk of the United States District Court, dated and entered on the 28th day of April, 1939, in the Office of the Clerk of the United States District Court for the Southern District of New York, in the above-entitled proceeding to vacate, vacating and setting aside the decree of the United States District Court for the Southern District of New York, dated the 30th day of December, 1929, insofar as said order failed to order,

3328 *Notice of Cross Appeal*

adjudge and decree that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, were collusively made parties plaintiff for the purpose of creating a cause cognizable under the Trading with the Enemy Act; that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman and Sielcken, were nominal party plaintiffs in the instant suit and retained none of the moneys paid them by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States,
3329 pursuant to the decree of this Court entered on the 30th day of December, 1929; that the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, was the real party in interest in the instant suit and that John S. Sorenson and Thorleif S. B. Nielsen, as surviving partners of the firm of Crossman & Sielcken, handed over to the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, all of the moneys and property paid by Howard Sutherland, as Alien Property Custodian, and Frank White, as Treasurer of the United States, out of moneys and property of the United States, pursuant to the decree entered
3330 in this court on the 30th day of December, 1929; and that Frank Murphy, as Attorney-General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, have and recover of and from the Irving Trust Company, as executor of the estate of Hermann Sielcken, deceased, Intervenor, the sum of $727,618.93, with interest thereon at six per cent from April 10, 1930, to the date of payment of this judgment, together with the costs of this action to be taxed; and that said Irving Trust Company, as executor of Hermann Sielcken, deceased, Intervenor, pay said sums to said Frank Murphy, as Attorney-General of the United States in behalf of the United States, and as successor to the Alien Property Custodian, within twenty days, in default of which payment, said Frank Murphy, as Attorney-General of the United States in be-

half of the United States, and as successor to the Alien Property Custodian, shall have execution therefor; and that the bill of complaint herein be dismissed for want of jurisdiction.

Dated, New York, N. Y., May 23, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for United States. 3332
FRANCIS J. McNAMARA,
Special Assistant to the Attorney-General,
Attorney for Honorable Frank Murphy,
as Attorney-General for the United
States,
Office and Post Office Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

LEONARD B. SMITH & SELDEN BACON, Esqs., 3333
Attorneys for Irving Trust Company as Executors
of Hermann Sielcken, deceased,
15 Broad Street,
New York, N. Y.

GARFIELD, WRUBEL & LAZARUS,
Attorneys for John S. Sorenson,
25 West 44th Street,
New York, N. Y.

(Filed in the office of the Clerk of the District Court of the United States for the Southern District of New York on May 23rd, 1939.)

3334 **Stipulation.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

3335 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

Equity No. 44-28.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the estate of Hermann Sielcken, deceased,

Interventor.

3336 It Is Hereby Stipulated And Agreed that the foregoing, Volume I containing pages 5 to 621 and this Volume II containing pages 622 to 1111, is a true transcript of the entire record of the said District Court in the above-entitled proceeding to vacate the decree of December 30, 1929, as agreed upon by the parties.

Dated, New York, August 4th, 1939.

LEONARD B. SMITH AND SELDEN BACON,
Attorneys for the Irving Trust Company
as Executor of Herman Sielcken, Deceased.

3337

FRANCIS J. McNAMARA,
Special Assistant to the Attorney General of the United States of America, Attorney for Frank Murphy, Attorney General of the United States on behalf of the United States and as Successor to the Alien Property Custodian, Office of United States Attorney, Foley Square, New York, N. Y.

JOHN J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States, United States Court House, Foley Square, New York City.

3338

GARFIELD, WRUBEL & LAZARUS,
Attorneys for John Sorenson.

3339

3340 **Clerk's Certificate.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOHN S. SORENSON and THORLEIF S. B. NIELSEN, as the surviving partners of the firm of Crossman & Sielcken,

Plaintiffs,

against

3341 HOWARD SUTHERLAND, as Alien Property Custodian, FRANK WHITE, as Treasurer of the United States, and ZENTRAL-EINKAUFS-GESELLSCHAFT, m. b. H.,

Defendants.

In Proceedings to vacate final decree of December 30, 1929.

IRVING TRUST COMPANY, as Executor of the estate of Hermann Sielcken, deceased,

Interventor.

Equity No. 44-28.

3342 I, Charles Weiser, Clerk of the District Court of the United States for the Southern District of New York, hereby certify that the foregoing, contained in Volume I, pages 5 to 622, and this Volume II, containing pages 622 to 1111, is a true copy of the record of the said District Court in the above-entitled proceeding to vacate the decree of December 30, 1929, as agreed on by the parties.

In Testimony Whereof, I have caused the seal of the said District Court to be hereunto affixed at the City of New York, in the Southern District of New York, this 7th day of August, in the year of our Lord, One thousand nine hundred thirty-nine, and of the Independence of the said United States, the One hundred sixty-fourth.

CHARLES WEISER,
Clerk of the United States District Court for the Southern District of New York.

(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT, AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY-GENERAL OF THE UNITED STATES ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Notice of motion

SIRS: Please take notice that upon the annexed affidavit of David W. Wain[illegible]ouse, assistant United States Attorney, sworn to the 29th day of January 1940, the undersigned will move this Court at a stated term thereof for the hearing of motions, to be heard in the United States Court House, on the 13th day of February 1940 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order substituting Honorable Robert H. Jackson, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, in place of Honorable Frank Murphy, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, now resigned.

Dated: New York, January 29, 1940.

Yours, etc.,

JOHN T. CAHILL,

United States Attorney for the Southern District of New York, Attorney for Honorable Robert H. Jackson, Attorney General of the United States, and as successor to the Alien Property Custodian in behalf of the United States of America, United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

229836—40

To:

LEONARD B. SMITH AND SELDEN BACON, *Esqs.*,
Attorneys for Irving Trust Company as Executor
Herman Sielcken, deceased, 15 Broad Stre
New York, N. Y.

GARFIELD, WRUBEL & LAZARUS, *Esqs.*,
Attorneys for John S. Sorenson, 25 West 44th Stre
New York, N. Y.

United States Circuit Court of Appeals for the Second Circuit

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURV
ING PARTNERS OF THE FIRM OF CROSSMAN & SIELCK
PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRA
WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTR
EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 192

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCK
DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLA
AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES ON BEHALF
THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPE
CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Affidavit

STATE OF NEW YORK,
County of New York,
Southern District of New York, ss:

David W. Wainhouse, being duly sworn, deposes and says t
he is an Assistant United States Attorney for the Southern D
trict of New York, and as such is in charge of the above entit
matter.

That by the order of the United States District Court for
Southern District of the United States, Honorable Frank Murp
was substituted in the place of Honorable Homer S. Cummi
as Attorney General of the United States and successor to
Alien Property Custodian, in behalf of the United States
America.

That Honorable Frank Murphy has resigned from the office of Attorney General of the United States and has been succeeded by Honorable Robert H. Jackson in that capacity.

Wherefore, your deponent prays that Honorable Robert H. Jackson as Attorney General of the United States and successor to the Alien Property Custodian in behalf of the United States of America be substituted for Honorable Frank Murphy as Attorney General of the United States and successor to the Alien Property Custodian in behalf of the United States of America in this cause.

DAVID W. WAINHOUSE.

Sworn to before me this 29th day of January 1940.

ISADORE M. FUCHS,
Notary Public, Bronx County.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of February one thousand nine hundred and forty.

Present: Hon. THOMAS W. SWAN, Hon. AUGUSTUS N. HAND, Hon. ROBERT P. PATTERSON, Circuit Judges.

JOHN S. SORENSON AND THORLIEF S. B. NIELSON, PLAINTIFFS

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, ET AL., DEFENDANTS; IRVING TRUST CO., AS EXECUTORS; ATTORNEY GENERAL OF THE UNITED STATES, APPELLANTS

A motion having been made herein by counsel for the Attorney General of the United States for an order substituting Honorable Robert H. Jackson, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, in place of Honorable Frank Murphy, as Attorney General of the United States, and successor to the Alien Property Custodian in behalf of the United States of America, now resigned,

Upon consideration thereof it is ordered that said motion be and hereby is granted.

D. E. ROBERTS, *Clerk.*

Order

United States Circuit Court of Appeals, Second Circuit. Feb. 14, 1940. D. E. Roberts, Clerk.

United States Circuit Court of Appeals for the Second Circui

No. 99—October Term, 1939

(Argued November 16, 1939. Decided February 19, 1940)

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

vs.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES, AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to Vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Appeal from United States District Court for the Southern District of New York.

Appeal by Irving Trust Company as executor of Herman Sielcken, deceased, from an order of the United States District Court for the Southern District of New York dated April 28, 193 which vacated a final decree of the same court entered on Decem ber 30, 1929, after a trial before Judge Caffey. The decree s vacated directed the Alien Property Custodian and the Treasure of the United States to pay to the plaintiffs John S. Sorenso and Thorleif S. B. Nielsen as surviving partners of the firm o Crossman & Sielcken, out of property seized by the Alien Property Custodian in the name of Zentral-Einkaufs-Gesellschaft, m. b. H. (hereinafter termed Z. E. G.) the sum of $716,160.37 and interest No appeal was taken from the decree of December 30, 1929, and the amount awarded thereby was paid by the Alien Property Custodian and the Treasurer of the United States to the plaintiffs o April 10, 1930. The suit in which the decree was entered was brought by Sorenson and Nielsen as surviving partners of Cross man & Sielcken against the Alien Property Custodian, the Treasurer of the United States and Z. E. G.

The bill of complaint alleged in Article "First" that Sorenson, Nielsen and one Hermann Sielcken, "all being citizens and residents of the United States, were engaged in business * * * as copartners doing business under the firm name and style of Crossman & Sielcken, and said partnership continued * * * business * * * up to the date of the death of Hermann Sielcken * * *."

It alleged in Article "Second" that Crossman & Sielcken at all times "has had its principal place of business in the Borough of Manhattan, City, State and Southern District of New York, * * * has been and is a resident of said Borough of Manhattan, City and State of New York, * * * has not at any time been a resident within territory (including that occupied by the military and naval forces) of any nation with which the United States was at war and was not, nor at any time has it been, an enemy or ally of enemy within the meaning and purview of those terms as used and defined in the Act of October 6, 1917, known as * * * the Trading with the Enemy Act, or in any act amendatory thereof and supplemental thereto."

The bill went on to allege that Z. E. G. was a corporation organized about the month of January 1915 under the laws of Germany, with its principal place of business in the City of Berlin and that it succeeded to all of the business assets and liabilities of the Reichseinkauf which was a purchasing agent of the German Government; that in September 1914 Reichseinkauf entered into an agreement with Crossman & Sielcken, under the terms of which the latter was employed to purchase mixed cargoes of wheat, tea, cocoa, and mixed animal feed for account of Reichseinkauf to be shipped by neutral vessels from American ports to neutral Baltic ports and that Crossman & Sielcken were to be reimbursed for the invoice price, freight, and insurance, and to be paid a commission of 10 per cent on the value of the cargoes; that thereafter Reichseinkauf and its successor Z. E. G. instructed Crossman & Sielcken to stop shipments of wheat and flour and in their place to purchase pure lard, fat backs, near backs, short backs, clear backs, cakes, and cereals. The complaint further alleged that between February 27, 1915 and April 28, 1915 certain merchandise of the character above mentioned was purchased by Crossman & Sielcken and shipped in certain vessels consigned to Harry Levin and Becknann & Jorgensen, agents of Z. E. G. at Copenhagen, Denmark. It set forth six different shipments made by Crossman & Sielcken in February, March and April 1915, alleged that they were seized by the British Naval Authorities and condemned in the British Prize Court, that Crossman & Sielcken had not been reimbursed for the invoice value, insurance and freight or paid any part of their 10 per cent commission on the shipments, with the exception of $8,050.44 for certain merchandise shipped on one of the vessels.

The bill further alleged that the invoice value, freight, insura and commission due and owing to the plaintiffs amounted $380,761.54, plus interest; that Hermann Sielcken died on Octo 8, 1917, that the plaintiffs as surviving partners were under a d to wind up the business of the firm and that they filed their bill enforce the rights given the partnership under Section 9, sub vision (a) of the Trading with the Enemy Act as amended.

The bill finally alleged that the Alien Property Custodian the Treasurer of the United States held property amounting $669,155.00 which had been theretofore transferred or paid to Alien Property Custodian or seized by him as property belong to or held for the benefit of Z. E. G. which was an enemy wit the meaning of that term as used in the Trading with the Ene Act; that on November 12, 1927 the plaintiffs as surviving pa ners of Crossman & Sielcken filed a notice of their claim with Alien Property Custodian in conformity with Section 9 (a) of Trading with the Enemy Act, as amended.

The bill concluded by praying that a decree be entered est lishing the debt claimed by the plaintiffs to be due and owing Crossman & Sielcken by Z. E. G. and ordering payment ther to them as surviving partners.

Z. E. G. filed its answer to the bill denying the allegation th Sielcken was a resident of the United States and that the pa nership was not "an enemy or ally of enemy" and that Z. E. was indebted to Crossman & Sielcken. It alleged by way of se arate defense that when war was declared on April 6, 1917 Sielck resided in Germany and became an alien enemy and that the fi of Crossman & Sielcken was dissolved thereby; that title to assets was thereafter held by the Alien Property Custodian trustee and he had never returned or otherwise released the ass to Crossman & Sielcken or to the plaintiffs as surviving partne The answer further alleged that the claim asserted by the plai tiffs belonged not to them but to the estate of Sielcken, the d ceased partner, that Crossman & Sielcken had a joint account wi the firm of Theodore Wille & Company of Hamburg, Germa under the terms of which the latter had an equal interest with t firm of Crossman & Sielcken in the shipments and that Theodo Wille & Company was accordingly a necessary party.

The Alien Property Custodian and the Treasurer of the Unit States also answered the bill and moved to dismiss the same the ground that it appeared on its face that no debt was owing the plaintiffs by Z. E. G. and that they had not stated facts suf cient to entitle them to equitable relief under the provisions of t Trading with the Enemy Act. It also alleged that those defen ants were without knowledge as to the averments of the bill th Hermann Sielcken was a resident of the United States and th the partnership was not an enemy or ally of enemy and th Z. E. G. was indebted to the firm in the sum of $380,761.54 a interest.

After hearing the proofs Judge Caffey found that Z. E. G. was indebted to the plaintiffs in the sum of $380,761.54 and interest and that the defendants should transfer to the plaintiffs out of the money seized by the Alien Property Custodian and held by him or the Treasurer the sum of $716,160.37.

The Attorney General on behalf of the United States and as successor to the Alien Property Custodian moved to vacate the decree of December 30, 1929 on the ground that jurisdiction to enter it was lacking. The court held that: "The plaintiffs neither prior nor subsequent to the death of Hermann Sielcken, were the owners of the debt claimed within the terms of the Act, and had no standing to invoke the jurisdiction of this court in this suit brought by them, either as individuals or as the alleged surviving partners of the firm of Crossman & Sielcken," but that on the contrary Hermann Sielcken during his lifetime, and his estate upon his death, owned the entire capital of the firm and for several years prior to his death on October 8, 1917 had been an enemy alien under Section 2 of the Act, so that Irving Trust Company as his executor was not qualified to be a claimant. In connection with the finding of lack of jurisdiction to enter the original decree in favor of the plaintiffs, the court said that: "The decree which the Government * * * seeks to vacate, although nominally between the plaintiffs, as alleged non-enemy surviving partners * * * and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants; furthermore, it appears that Sorenson and Nielsen were collusively made parties for the purpose of creating a case cognizable under the Trading with the Enemy Act." Upon these findings the judge made an order under date of April 28, 1939, granting the motion to vacate the decree of December 30, 1929, and setting aside the decree "because this Court was without jurisdiction to enter the same". Irving Trust Company as executor of Sielcken having intervened in the suit appealed from the order. The Attorney General on behalf of the United States and as successor to the Alien Property Custodian filed a cross-appeal seeking restitution to the United States of the moneys paid under the decree of December 30, 1929 alleged to have been entered without jurisdiction.

Order dated April 28, 1939 vacating the decree of December 30, 1929 and declaring it void for lack of jurisdiction reversed and original decree reinstated.

Before L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges.

Leonard B. Smith and Selden Bacon, Attorneys for Irving Trust Company as Executor of Hermann Sielcken, deceased, Appellant; Nathan L. Miller and Selden Bacon, Counsel.

Francis M. Shea, Assistant Attorney General, John T. Cahill, United States Attorney, Francis J. McNamara, Special Assistant

to the Attorney General, Frank C. Sterck and James A. Shipper, Attorneys, Department of Justice, for the Attorney General, Appellee and Cross-Appellant; David W. Wainhouse, Counsel.

AUGUSTUS N. HAND, Circuit Judge: A decree of the District Court dated December 30, 1929 adjudged that Z. E. G. was indebted to the plaintiffs in the sum of $380,761.54 and interest, aggregating altogether $716,160.37, and that the Alien Property Custodian and the Treasurer of the United States should pay that amount to the plaintiffs as surviving partners of Crossman & Sielcken out of property of Z. E. G. which had been seized by the Alien Property Custodian. The aggregate with interest accrued since the date of the decree was paid to the plaintiffs by the Alien Property Custodian and Treasurer on April 17, 1930. About nine years after entry of the foregoing decree it was vacated on the application of the Attorney General upon the ground that the court had lacked jurisdiction to entertain the suit and make the decree because Hermann Sielcken, a member of Crossman & Sielcken, had resided in Germany since 1914 and had thus become an enemy alien after war was declared. In our opinion the various issues involved in the motion to vacate the decree were before Judge Caffey and his decision was binding on the later court. Chicot County Drainage District v. Baxter State Bank, decided by the Supreme Court on January 2, 1940; Stoll v. Gottlieb, 305 U. S. 165.

The bill of complaint before Judge Caffey alleged that Sorenson, Nielsen and Hermann Sielcken were citizens and residents of the United States and were doing business under the name of Crossman & Sielcken up to the date of the death of Sielcken, that that firm had at all times been a resident of New York, had not been a resident within the territory of any nation with which the United States was at war and was not at any time an enemy or ally of enemy. Z. E. G. not only denied these allegations but also set up the separate defense that Sielcken resided in Germany when war was declared and that he became an enemy alien, that the firm of Crossman & Sielcken was dissolved by the declaration of war and that the claim asserted by the plaintiffs as surviving partners belonged to the estate of Sielcken and not to the plaintiffs as surviving partners. The government, likewise, attacked the bill both by way of demurrer and by answer and raised the same issues.

The adjudication by Judge Caffey that Z. E. G. owed the plaintiffs $716,160.17 and that they should recover that amount, necessarily involved findings that Sielcken resided in New York at the time of his death, that he was not an enemy alien within the meaning of the Trading with the Enemy Act and that the claim against Z. E. G. belonged to the plaintiffs as surviving and liquidating partners of Crossman & Sielcken. Section 9 (a) of the Act provides that "any person not an enemy or ally of enemy claiming any interest, right or title in any money or other prop-

y which may have been conveyed, transferred, assigned, de-
ered, or paid to the Alien Property Custodian or seized by him
eunder and held by him or by the Treasurer of the United
tes, or to whom any debt may be owing from an enemy or ally
enemy whose property or any part thereof shall have been con-
ed, transferred, assigned, delivered, or paid to the Alien Prop-
y Custodian or seized by him hereunder and held by him or
the Treasurer of the United States may file with the said custo-
n a notice of his claim under oath." The section goes on to
vide that such a claimant who has filed a notice of claim may
stitute a suit in equity * * * in the district court of the
ited States for the district in which such claimant resides
* * to establish the interest, right, title, or debt so claimed,
l if so established the court shall order the payment * * *
said claimant * * *."

By the decree of December 30, 1929 it was necessarily held
t the plaintiffs had filed their claim as required by the Trad-
with the Enemy Act and that Z. E. G. was an enemy alien
l owed moneys to the partnership to the amount of $716,160.37
udged to be due.

The statement in the opinion of the court below (fol. 3253)
t Article "Second" of the bill "as to non-enemy status" did not
ege facts sufficient to confer jurisdiction on the court seems to
ve disregarded the allegation in Article "First" that Sorenson,
elsen and Sielcken were "all * * * citizens and residents
the United States" and that of Article "Second" itself that the
rtnership of Crossman & Sielcken "was not, nor at any time has
been, an enemy or ally of enemy." These allegations were to
e effect that each member of the firm was at all times a resident
l citizen of the United States and the answers put them directly
issue.

In addition to the alleged defect in pleading the court was ap-
rently of the belief that if it found Sielcken to have been in
t a resident of Germany the issues raised by the original bill
l answers and necessarily determined in favor of the plaintiffs
Judge Caffey could be disregarded because his decision was
sed on erroneous findings affecting jurisdiction. But whatever
y have been the trend of the earlier authorities the decisions of
e Supreme Court in Chicot County Drainage District v. Baxter
ate Bank, decided January 2, 1940, and Stoll v. Gottlieb, 305
S. 165, make the decree of December 30, 1929, res judicata as
the issues involved in the motion to vacate. In rendering
at decree Judge Caffey was obliged to resolve disputed questions
fact on which his jurisdiction depended and his decision that
e jurisdictional facts were established cannot be collaterally
tacked. In Chicot County Drainage District v. Baxter State
nk, the Supreme Court held the parties to an action to be bound
a judgment of a United States District Court which neces-
ily involved recognition of an act as constitutional, even though

the act was later in another proceeding held to be invalid, Ashton v. Cameron County Dist., 298 U. S. 513, and the question as to its constitutionality had not expressly been raised in the former action. Attack on the former judgment on the ground that lack of jurisdiction made it void was therefore precluded. The government had the same opportunity to present the issue as to residence and citizenship of Sielcken in the trial before Judge Caffey as in the later proceeding and can gain no right to a second presentation.

The case at bar falls clearly within the rule of Stoll v. Gottlieb and of the Chicot County decision. Not only was there every opportunity to present the matters now relied on by the government in the trial before Judge Caffey, but those matters were expressly raised and argued before him. It is true that it was not argued to Judge Caffey that the material facts were "jurisdictional"; but it was urged that the plaintiffs had no right to sue under the Trading with the Enemy Act—which is the very issue of jurisdiction which is now before this court. Apart from the failure to use the word "jurisdiction" the parties to the previous trial could scarcely have raised the issue of right to sue more squarely. The answer of Z. E. G. alleged that title to the claim was held by the Custodian and that the German firm of Wille & Company had a half interest in the claim. In oral argument before Judge Caffey, dismissal of the action was asked by counsel for the government on the ground that Sielcken was an enemy under the Act.

The issues thus raised are the same issues which are pertinent on the "jurisdictional" question of right to sue under the Trading with the Enemy Act. Even if Judge Caffey was wrong in deciding these issues in favor of the plaintiffs the government should have taken an appeal from his decision if it wished to question it further. No appeal was taken and the merits of these questions cannot be now raised on a motion to vacate. No more is thus requested than a reconsideration of matters on which there was a full hearing. Once lost, the right to appeal cannot be regained in this circuitous manner.

The decision in Vallely v. Northern Fire Ins. Co., 254 U. S. 348, was strongly relied upon by the court below, but the distinction between that case and the case at bar is the same one pointed out by Justice Reed when distinguishing it from Stoll v. Gottlieb, namely, that in Vallely v. Northern Fire Ins. Co. the question of jurisdiction had not been litigated in the prior suit, whereas in Stoll v. Gottlieb and in the case at bar it was. But in Chicot County Drainage District v. Baxter State Bank, supra, an earlier decision was held binding even though the question of jurisdiction had not been raised at the first trial, because it might have been raised there and was necessarily involved.

The court below, in the course of its opinion, stated that the plaintiffs were made parties "for the purpose of 'creating a case

gnizable' under the Trading with the Enemy Act" and that the ecree was, therefore, collusively obtained. But the right of the laintiffs to sue was the very matter in issue before Judge Caffey. he objections to their claim because their partner Sielcken was n enemy alien and was the sole owner of the capital of the partership and their firm was engaged in a joint enterprise with Ville & Company, an alleged enemy alien concern, were all overuled by Judge Caffey. There can be no basis for impeaching his ecree in a new litigation on the very grounds urged at the original rial (United States v. Throckmorton, 98 U. S. 61, 66), even hough those grounds were jurisdictional. Stoll v. Gottlieb, 305 J. S. 165.

Although the government only moved to set the decree aside or lack of jurisdiction, there was some attempt in its affidavits to how that the judgment of the plaintiffs against Z. E. G. under he decree of December 30, 1929, was collusive because a prior greement had been made with Z. E. G. by the German executors f Sielcken to indemnify it against any recoveries by Sorenson nd Nielsen, as surviving partners of Crossman & Sielcken. In ther words, there seems to be a contention by the government though it was not alluded to in the opinion of the court below r urged on this appeal) that the plaintiffs obtained judgment gainst the funds of Z. E. G. in the hands of the Custodian, knowng that a substantial part of their recovery was to be turned ack to Z. E. G. and that in April, 1930, they repaid to Z. E. G. a ubstantial percentage of the recovery pursuant to this underanding the answer to the government's contention by the Irving Trust Company as executor of Sielcken is (1) that the agreement f indemnity made by Sielcken's German executors was not bindng on the Trust Company as American executor, (2) that the greement was of doubtful validity and (3) that Mr. Rhodes, who represented the government in the trial before Judge Caffey, knew all about the agreement of indemnity and the return to Z. E. G. of part of the recovery.

The claim that Rhodes was not aware of these facts was based on an unverified statement made by the latter to the government attorney Sterck.

The proceeds of the recovery of the plaintiffs were distributed in April, 1930, under an agreement of settlement, made after the entry of the decree by Judge Caffey. At the time of the settlement there were substantial assets of the Sielcken estate in Germany out of which the agreement of indemnity, if held valid by German courts, might have been satisfied, and the settlement was made and carried out some time after the entry of the decree. Therefore, the mere payment to Z. E. G. from the American assets would not show that the judgment recovered against them by the plaintiffs was fraudulent in whole or in part.

Moreover, if a decree is to be set aside, on the ground of fraud, nine years after it was rendered, the remedy would have to be by bill of review, which would only be allowed if the court were

satisfied that the evidence was not available at the time the original suit was litigated and that it was presented without undue delay after discovery. United States v. Throckmorton, 98 U. S. 61; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 421. In no event would there be any justification for setting aside a decree on affidavits without examination and cross examination of witnesses particularly where the affidavits proved to be contradictory in respect to important issues. It is perhaps unnecessary to reiterate that the trial court only vacated the decree for lack of jurisdiction and that we hold it was precluded from doing this because the same issues were involved in the trial before Judge Caffey.

The order of the court below is reversed and the motion to set aside the decree of December 30, 1929, is denied.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of March, one thousand nine hundred and forty.

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, Circuit Judges.

JOHN S. SORENSON AND THORLEIF S. B. NIELSEN, AS THE SURVIVING PARTNERS OF THE FIRM OF CROSSMAN & SIELCKEN, PLAINTIFFS

v.

HOWARD SUTHERLAND, AS ALIEN PROPERTY CUSTODIAN, FRANK WHITE, AS TREASURER OF THE UNITED STATES AND ZENTRAL EINKAUFS GESELLSCHAFT, M. B. H., DEFENDANTS

In Proceedings to vacate Final Decree of December 30, 1929

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, INTERVENOR IN PROCEEDING TO VACATE, APPELLANT, AND RESPONDENT ON CROSS-APPEAL

THE ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, RESPONDENT AND CROSS-APPELLANT

THE UNITED STATES OF AMERICA, RESPONDENT

JOHN S. SORENSON, DEFENDANT-RESPONDENT

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court, dated April 28, 1939, vacating the decree of December 30, 1929 and declaring it void for lack of jurisdiction, be and it hereby is reversed and the original decree reinstated.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS, *Clerk.*

Order for mandate

United States Circuit Court of Appeals, Second Circuit. Filed Mar. 7, 1940. D. E. Roberts, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York.

I, D. E. Roberts, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1136, inclusive in 2 volumes, contain a true and complete transcript of the record and proceedings had in said Court, in the case of John S. Sorenson and Thorlief S. B. Nielsen, Plaintiffs, against Howard Sutherland, as Alien Property Custodian, et al., Defendants. Irving Trust Co., as Executors; Attorney General of the United States, Appellants as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this second day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS, *Clerk.*

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Supreme Court of the United States

Order allowing certiorari

Filed June 3, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1940